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No. 104

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1929.

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD,
Appellant.

vs.

JOSEPH B. THOMPSON, Superintendent of the Insurance Department of the State of Missouri and STRATTON SHARTEL, Attorney General of the State of Missouri,
Appellees.

Appeal from the District Court of the United States for the Western District of Missouri.

BRIEF FOR APPELLANT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1929.

No. 104.

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, *Appellant,* vs. **JOSEPH B. THOMPSON, Superintendent of Insurance Department of the State of Missouri and STRATTON SHARTEL, Attorney General of the State of Missouri,** *Appellee.*	Appeal from the District Court of the United States for the Western District of Missouri.

BRIEF FOR APPELLANT.

There is no official report of the opinion delivered in the court below. Opinion was rendered on April 13, 1929. Applications for interlocutory injunction were contemporaneously heard in 155 cases of which this is one. Injunctions were granted in forty-one cases and denied as respects 114 applicants of whom appellant was one. The 155 suits were all of like tenor, praying identical relief against the same defendants. Hearing was before a statutory three judge court.

Appellant has complied with Paragraph 1 of Rule 12, respecting statement of grounds on which the jurisdiction of the court is invoked, which will not be here repeated.

STATEMENT OF THE CASE.

This is an appeal from an order of the District Court of the United States for the Western Division of the Western District of Missouri, pursuant to a hearing before a statutory three judge court. The order appealed from denies the application of appellant for an interlocutory injunction. Such application for an interlocutory injunction was in writing (R. 46) and prayed for an interlocutory injunction to enjoin the enforcement of an insurance *rate order* made by the superintendent of insurance of Missouri, on *October 9, 1922.* Such order was directed to appellant and all other stock fire insurance companies doing business in Missouri and was served upon the rating organization of which appellant and other fire insurance companies were members. The rate order of October 9, 1922, exclusive of its formal parts, is as follows:

> "You and each of you are hereby notified that I have this day ordered a reduction of ten per cent in the rates now charged by the aforesaid companies on fire, lightning, hail and windstorm insurance business written in the State of Missouri, which, reduction, in my judgment, will still leave said companies a reasonable profit after giving proper and reasonable consideration to the conflagration liability, both within and without the state.
>
> The aforesaid reduction order shall take effect and be in operation on and after the 15th day of November, 1922, and shall be applied subject to the approval of the Superintendent of Insurance. If the companies do not, within thirty days from this order of reduction submit a class or classes which meets the approval of the Superintendent of Insurance, the Superintendent will designate the class or classes to which the reduction shall apply." (R. 5.)

The power to make such rate order was asserted to exist under Section 6283 of the Revised Statutes of Missouri, 1919 (R. 4), which statute is as follows:

> "Sec. 6283. Superintendent to investigate the reasonableness of rates—authority to order reductions. The

Superintendent of Insurance, upon written complaint of any citizen, or upon his own motion, is hereby empowered to investigate the necessity for a reduction of rates, and if, upon such investigation, it appears that the result of the earnings in this state of the stock fire insurance companies for five years next preceding such investigation shows there has been an aggregate profit therein in excess of what is reasonable, he shall order such reduction of rates as shall be necessary to limit the aggregate collections by insurance companies in this state to not more than a reasonable profit. Any reduction ordered by the Superintendent of Insurance shall be applied, subject to his approval: Provided, that the Superintendent of Insurance shall designate the class or classes to which the reduction shall be applied if the companies do not, within thirty days from the order of reduction, submit a class or classes which meet his approval. In determining the question of rates and profits in accordance with this article, the Superintendent of Insurance shall give proper and reasonable consideration to the conflagration liability, both within and without the state."

The application for an interlocutory injunction was pursuant to provisions of the Federal Statutes and was served upon the governor and attorney general of the State of Missouri. (R. 48.) It was based upon and presented upon facts appearing in the verified bill of complaint (R. 1-37) and amendments thereto (R. 44-46) and supporting affidavits filed (R. 67-92). No evidence was offered in contradiction by the appellees who presented only two verified motions to dismiss the suit or stay proceedings, the motion to dismiss the suit alleging *res judicata* and estoppel by reason of a certain stipulation hereinafter more particularly noted. (R. 49-57.)

The decision of the court below, is to the effect that an injunction would issue to the appellant, except for an asserted estoppel arising out of the stipulation in question. Such stipulation appears in the record and is set forth in full in the opinion of the court below (R. 101-103), and is set forth at a later point in this statement.

Jurisdiction existed in the Federal Court below, by virtue of allegations of diversity of citizenship (R. 3) and the existence of the jurisdictional amount in controversy (R. 2). The bill proceeds further upon the ground of confiscation and alleges infringement of rights of appellant in its Federal Constitutional rights under the due process and equal protection clauses of the 14th Amendment. The facts appearing in the verified bill and amendments thereto respecting which there is no dispute in the record, are briefly as follows:

Appellant is a stock fire insurance company, a citizen of the State of Connecticut and appellees are citizens and residents of the State of Missouri, and are respectively the superintendent of the insurance department of Missouri and the attorney general of that state. (R. 1, 2.) Appellant has for years been licensed to do business in the State of Missouri and has substantial property there consisting of an established business, good will, agency plant, maps, surveys and rating records of a value greater than $3,000 (R. 3, 4). While appellant was so engaged in the conduct of its established business, the former incumbent of the office of the superintendent of insurance on October 9, 1922, made an order directing all stock fire insurance companies in Missouri, including appellant, to reduce their rates ten per cent on fire, lightning, hail and windstorm insurance. (R. 4, 5.) The statute requires that if the companies do not designate the classes to which any rate order shall apply, then designation of classes shall be made by the superintendent. The superintendent on February 1, 1928, designated the classes to which the reduction should apply. (R. 44-46.) (What is contemplated by the term "classes" as used in the statute is disclosed at R. 90.) On November 10, 1922, 157 companies, of whom appellant was one, filed a joint review proceeding, pursuant to the statutes of the state, to review the rate order in question, which review proceeding was pursuant to provisions of Missouri statutes, namely:

Section 6284 R. S. Mo. 1919, which is as follows:

"Sec. 6284. Order of superintendent reviewable by court action. The orders and directions of the superintendent of insurance, together with his findings or determinations of facts upon which such order or determination is founded, shall be reviewable by a proper action in the courts, and upon such review the entire matter shall be treated and determined *de novo*, but the burden of proof as to the unreasonableness or the injustice of any order made by the superintendent of insurance shall rest upon the party or company appealing from any such order. During the pendency of such action or review each insurance company or other insurer shall not charge any rate or premium in excess of that fixed by the superintendent of insurance. (Laws 1915, p. 313.)"

Under such joint review proceeding the rate order was held confiscatory, but on appeal, the Missouri Supreme Court reversed the decree of the Circuit Court and upheld the reduction order as against such joint attack. (*Aetna Insurance Co.* v. *Hyde*, 315 Missouri 113.) (See R. 5.) Certiorari was brought to the Supreme Court of the United States, which granted certiorari and later dismissed the writ on the ground that the issue of confiscation respecting individual companies could not arise in such joint review proceeding; that if confiscation existed, it was the subject of an independent suit by individual companies. (*Aetna Insurance Company, et al.* v. *Hyde, et al.*, 275 U. S. 440.)

Appellant, in the instant suit (filed by it individually, after the decision of the Supreme Court of the United States), asserts that the statute as applied to it by the rate order is confiscatory, and that its constitutional rights existing under the due process clause of the 14th Amendment of the Federal Constitution are violated. (R. 8-10.) The fact is alleged in the verified bill that during the five years preceding the date of the rate order (five years being the test period fixed by statute), namely the years 1917 to 1921, appellant sustained

a loss upon the conduct of its business of insurance in Missouri. (R. 11.)

That its income (earned premiums) was	$2,024,766.00
Its outgo (incurred insurance losses and expenses) was	2,330,251.00
And that its outgo exceeded its income by the sum of	$ 305,485.00

In the six years succeeding the date of the rate order, namely 1922 to 1927 inclusive, it likewise sustained a loss (R. 11, 46), namely:

Income (earned premiums)	$3,501,540.00
Outgo (incurred losses and expenses)	3,702,496.00
Loss (excess of outgo over income)	$ 200,956.00

This excess of outgo over income was suffered at going premium rates and would have been increased had the reduction been in force. During all of the period in question, the business of appellant was prudently, soundly and economically conducted. (R. 10.) The insurance companies doing business in the State of Missouri during that period, likewise suffered an aggregate loss in the conduct of their business, outgo being more than $7,000,000 in excess of income during the period of 1917 to 1921 inclusive. (R. 6.) During the period since the date of the rate order the aggregate experience of all companies in the state discloses their outgo exceeded income by $11,233,102 upon $139,972,636 of premiums. (R. 91, 92.)

The bill alleges that in the light of the individual experience of the appellant and considering the experience of other properly conducted insurance companies, the order which would further decrease income, is confiscatory and in violation of the 14th Amendment (R. 8-10.) The grounds on which the claim of confiscation rests are shown in great detail in the verified bill of complaint (R. 11-19) and in the supporting affidavits (R. 66, 76, 83, 91).

The bill challenges the constitutionality of the rating statute and of the rate order purporting to be made under it as violative of the 14th Amendment of the Constitution of the United States in the following, among other particulars:

(*a*) The rating statute of Missouri as applied by the Superintendent in his rate order and justified by the Supreme Court of Missouri, was based upon a consideration of aggregate experience of all companies doing business in the state (R. 5-11), without taking into consideration the individual experience of the plaintiff. Such basis employed was that of premiums *received* as income and losses and expenses *paid* as outgo. The premiums received by all companies during the period was $83,502,181 and losses and expenses paid were $80,161,057. (R. 5-11.) The reduction of ten per cent ordered would completely destroy the small balance of profit existing. The proper basis for measurement of profit or loss is alleged to be that of premiums earned as income and losses and expenses incurred as outgo. Experience during the test period, discloses a loss in the aggregate of all companies of over $7,000,000 in excess of income during the test period, which would be increased by the amount of the reduction. (R. 6.)

[The court below, while criticizing the earned and incurred basis, urged by appellant, did not decide the case upon that ground, but granted interlocutory injunctions (R. 127, 128) to forty-one companies which made application at the same time as appellant did, these companies setting up their experience on the earned and incurred basis. The ground upon which the court below granted interlocutory injunction to some companies and denied it to others, was solely upon the basis that appellant was a party to the stipulation already mentioned. (R. 59.)]

(*b*) The rating statute as applied by the superintendent and justified by the courts of Missouri, took into account $2,301,132 of interest on unearned premiums as income. (R.

13, 14.) The rejection of this item from income is effective to destroy any balance of profit during the test period and coupled with the reduction, would compel the plaintiff to do business without any profit whatever. The court below sustained the contention of the appellant that the basis was fundamentally erroneous and that such item was not a proper element of income (R. 123).

(*c*) The court below also sustained the contention of the plaintiff that the superintendent erroneously eliminated from expenses $2,496,715 of commissions paid to St. Louis agents upon a scale higher than was paid in the remainder of the state. (R. 114-118.) The rejection of such proper outgo from the account, was asserted to be the adoption of an unsound basis, the effect of which was confiscatory upon the plaintiff. (R. 114-118.)

(*c*) The experience of the plaintiff, which had an established, soundly conducted and properly managed business (R. 10) as set forth in the bill, discloses an outgo in excess of its income during the five years preceding the rate order. (R. 11.) Had the rate order been in force during such test period, its outgo would have been approximately 125 per cent of its income. Its outgo has also exceeded its income since the date of the rate order, even without application of the rate reduction order. (R. 11.) The superintendent of insurance, by warrant of the statute, as construed and applied by the courts of Missouri, has taken into account elements which are arbitrary and capricious. (So found by the court below.) (R. 114-118-123.) By compliance with the rate order appellant will suffer a day to day loss of $50 per day, which will be irreparable and cannot be recouped. (R. 31.)

Other grounds of attack upon the statute and upon the rate order pursuant to it, as made in the bill of complaint, are that:

(*a*) The business of appellant is a private business and the regulations undertaken invade appellant's right of contract and take its property without due process of law. (R. 12.)

(*b*) Such statute is unconstitutional and as applied to appellant denies equal protection, in that it is applied only to stock fire insurance companies and exempts other insurers similarly situated and doing a like business. (R. 16-17, 18-19.)

(*c*) The statute authorizes proceeding to a reduction of appellant's rates without any provision for notice or hearing to appellant, which is a denial of due process of law. (R. 18.)

(*d*) The statute as construed and applied, authorizes adoption of a basis of premiums *received,* less losses and expenses *paid,* instead of premiums earned as income and losses and expenses incurred as outgo, and that the basis so warranted and employed is unreasonable, fundamentally erroneous and confiscatory and amounts to a denial of due process of law. (R. 13.)

(*e*) The statute as so construed and applied authorizes the taking into account of investment earnings styled "interest on unearned premiums"; that this is a fundamentally erroneous and confiscatory basis, and that predicating a reduction of appellant's rates on such basis is a denial of the due process of law. (R. 14, 15.)

(*f*) A like confiscatory effect of the statute, as construed and applied, exists by the elimination from expense of commissions in fact paid and properly and justifiably paid to agents of the appellant, and that such action is a denial of the due process of law. (R. 15, 16.)

The irreparable nature of the injury to appellant, if injunction be not granted, appears *in extenso* in the verified bill and discloses that the effect of compelling appellant to do business under the statute and rate order in question is to cause it a day by day confiscatory loss and force it to the alternative of abandoning an established business in Missouri, or, if it continue to do business and refuse to comply with the unconstitutional rate order under the unconstitutional statute aforesaid, to subject it to ruinous criminal proceeding, fines and penalties and that if it do business on the

reduced basis, it will suffer a day by day confiscation which will be irrecoverable. (R. 30-33.)

The court below sustained the position of appellant in two particulars, viz.:

(1) The superintendent adopted an arbitrary and unsound method in rejecting excess commissions from expense. (R. 117.)

(2) He adopted an unsound basis in the inclusion of interest on unearned premium in income. (R. 123.)

The court below declined to enter into consideration of invasion of constitutional rights or confiscation because it held that appellant was estopped to present such issues in a court of equity.

The stipulation which the court below holds to operate as an estoppel was made on February 14, 1922 (eight months before the making of the rate order in question in this suit). As the stipulation is given controlling effect by the court below, we set it out in full in this statement. (R. 85.) It is as follows:

"IN THE

CIRCUIT COURT OF COLE COUNTY, MISSOURI,
November Term 1921.

Aetna Insurance Company, *et al.*,
Plaintiffs,

vs.

Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri,
Defendant.

STIPULATION.

Whereas, Ben C. Hyde, Superintendent of the Insurance Department of the State of Missouri, has this day withdrawn and revoked the order published and declared by him on the 5th day of January, 1922, effective February 15, 1922, reduc-

ing the rates of insurance charged by all stock fire insurance companies doing business in the State of Missouri, on all fire, lightning, hail and windstorm business written by them in this State; now, therefore, it is hereby stipulated by and between the parties hereto that the following order may be entered of record in this cause:

1. The above entitled cause is hereby dismissed, and the restraining order heretofore entered therein is hereby dissolved, and all liability under the bond given pursuant to the conditions of said restraining order is hereby satisfied and discharged, and the surety on said bond is hereby released.

2. It is further stipulated and agreed that the said Superintendent of the Insurance Department, defendant herein, may, not earlier than March 15, 1922, call a hearing to investigate the necessary for a reduction in rates charged by the stock fire insurance companies doing a fire, lightning, hail and windstorm insurance business in this State; that at such hearing, if and when called, the stock fire insurance companies will appear by counsel and will produce such evidence as may be required by the Insurance Department, or they may see fit to present, bearing upon such question; that at such hearing the experience of said companies in the State of Missouri for the year 1921 shall be offered in evidence and considered by the Superintendent of the Insurance Department, together with such other evidence as may be offered in reaching his determination; that at the conclusion of such hearing the Superintendent of the Insurance Department will make findings of fact and announce his determination thereon, and that he shall, in writing, find all essential, material and competent matters of fact disclosed by the evidence; that he shall make the following findings:

(*a*) What was the profit of said stock fire insurance companies during the five years preceding said investigation, including the year 1921;

(*b*) What is a reasonable profit on the business written in this state;

(*c*) What per cent of premium received is allowed for the conflagration hazard;

(*d*) What is the basis upon which earnings in Missouri should be determined and ascertained;

(*e*) What is the ratio of expenses incurred to premiums earned in this State during such period;

(*f*) What is the ratio of losses incurred to premiums earned in this State during said period;

(*g*) What is the total amount of earned premiums during said period.

3. That if, based upon such findings of fact and the determination of the Superintendent of the Insurance Department, an order reducing the rates charged by such stock companies on all fire, lightning, hail and windstorm insurance business written by them in the State of Missouri be made by said Superintendent of the Insurance Department such order shall apply to all classes alike, and the said insurance companies, if dissatisfied with said order, will proceed to secure a review thereof by the trial *de novo* in the Circuit Court of Cole County, Missouri.

4. That no injunction shall be applied for in said matter restraining the enforcement of said order, but pending such review and until the final determination of said cause in whatever court it may be finally lodged, the rates in force prior to the making of such order shall be collected by such insurance companies, and such insurance companies shall give bond, conditioned and in such amount as the court may direct, to refund to the assured any excess of premiums collected by them if such order of the Superintendent of the Insurance Department be finally sustained by decree or judgment of a court of last resort.

5. That in such matter the question of the constitutionality of Sections 6283 and 6284, Revised Statutes of Missouri, 1919,

shall not be raised, nor shall the legality of the hearing above provided for be questioned.

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The statutory court below came to the conclusion that the foregoing stipulation was creative of an estoppel, and, speaking of plaintiff and other insurance companies in an identical position, says:

> "They should comply with the stipulation and make the refunds required thereby before asking any equitable relief. When that status has been fully established they will be in position to proceed to have their rates determined and protected, and not before." (R. 108.)

The court below, in its opinion, further says:

> "It is argued that to require this repayment (of all excess collected from November 15th, 1922, to date as a condition of applying for interlocutory injunction) is confiscatory because 'it would be impossible ever to recover back the repayments thus made to policyholders'." (R. 108.) (Explanatory words in parenthsis inserted by us.)

Respecting such contention, the Court says:

> "It is probable that such recovery would be impossible, or at any rate highly improbable. But such result is no reason for granting the injunctions." (R. 109.)

The Court holds that the rate order was effective on February 1, 1928, as to companies not parties to the stipulation,

but as to the plaintiff, and other parties to the stipulation, it is effective as of November 15, 1922. The Court says:

> "They (appellant and other companies in like situation) are estopped to deny that the order was not in effect as to them from the effective date (November 15, 1922), provided in the order itself.
>
> The plaintiffs herein which were not parties to the stipulation are in a better position. They can require an absolute compliance with the statute; as to them the order did not become effective until February 1, 1928." (R. 129, 130.) (Explanatory words in first parenthesis inserted by us.)

Although the rate order here in question was made October 9, 1922, the companies did not at any time submit any class or classes (for meaning of term "classes" see R. 90) to which the rate order should apply, as provided by statute, and the superintendent made no designation of classes to which the rate order should apply until February 1, 1928. On that date he made a written designation of classes, reciting the rate order and providing:

> "I hereby require that on February 1, 1928 this reduction be applied to the existing fire, lightning, hail or windstorm rates for all classifications of such risks," etc., (R. 89).

It is the contention of appellant that:

(*a*) Denial of injunction prayed for is an abuse of discretion.

(*b*) The stipulation is no bar to equitable relief, because plaintiff did not violate the stipulation.

(*c*) The stipulation made no provision for repaying excess premiums, as the Court rules must be done.

(*d*) The stipulation was abandoned by the superintendent, who did not make findings as required by it and, therefore, declined to be bound by it but chose rather to follow the statute.

SPECIFICATION OF ERRORS.

1. The United States District Court for the Western Division of the Western District of Missouri erred in overruling and denying the application for interlocutory injunction.

2. The Court erred and abused its discretion in imposing as a condition precedent to considering such application that appellant should refund ten per cent collected on premiums upon fire, lightning, hail and windstorm insurance since November 15, 1922; whereas there was no duty on appellant to make restitution in any amount under any circumstances prior to February 1, 1928.

3. The Court erred in determining the facts, particularly those relating to the stipulation and compliance or noncompliance with it, whereas such matters should more properly have been reserved to final hearing of the case. The Court was not warranted in deciding them against appellant at this stage.

4. It being conclusively shown that irreparable injury would result if interlocutory injunction were not granted, and that the balance of injury as between the parties was such that great harm would be done by denial of the injunction, whereas the rights of the opposing parties could be secured if it were granted, the Court erred and abused its discretion in denying the interlocutory injunction.

5. The Court erred in applying to appellant the doctrine of "unclean hands," because there was nothing before the Court reasonably warranting a conclusion that the hands of appellant were unclean.

6. The Court erred in holding that Section 6283, Revised Statutes of Missouri, 1919, is not in violation of the due process

and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States.

7. The Court erred in holding that the rate reduction order of October 9, 1922, is not in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

8. The Court erred in approving the basis of premiums received less losses and expenses paid as a measure of profit, whereas earned premiums and incurred losses and expenses form the only reasonable and appropriate basis for insurance profit calculation.

9. The Court erred in not enjoining the rate order, which was arbitrary and unreasonable not only as to the basis of premiums, losses and expenses adopted, but also because of taking into account investment earnings in fixing an underwriting rate.

(*e*) The stipulation applied only to proceedings in the statutory review proceeding in the state court and not to the present suit.

(*f*) The stipulation may not be given the effect which the court below gave it or be applied to plaintiff without violating the constitutional rights of appellant.

(*g*) The condition imposed for return of ten per cent of all premiums collected from November 15, 1922 to date as a condition of being heard, is without warrant.

Appellant relies upon each of the assignment of errors which it has filed herein, and specifies each of them as a ground for reversal of the cause.

SUMMARY OF ARGUMENT.

I.

The application of the Missouri Insurance Rate Regulation Statute to plaintiff, through the medium of the rate order, operates as a denial of due process of law in violation of the rights of appellant under the Fourteenth Amendment of the Constitution of the United States. The court below abused its discretion in denying appellants' application for an interlocutory injunction.

(*a*) The prescribed rate, permitting no return whatever to the operator of the business, is confiscatory.

Bluefield Water Works and Improvement Company v. *Public Service Commission,* 262 U. S. 679, 690.

(*b*) The questions presented are grave, and irreparable injury will result in the absence of an interlocutory injunction. Denial therefore, is an abuse of discretion.

Ohio Oil Company v. *Conway,* 49 Supreme Court Reporter, 256.

II.

A sound insurance profit and loss calculation can be made only upon the basis of earned premiums as income and incurred losses and expenses as outgo. It is unsound to state a supposed profit on the "paid" basis. Such method is arbitrary and fundamentally unsound.

(*a*) The statutes of Missouri require a setting up of unearned premiums as a liability and to maintain it as a re-

serve. It is arbitrary and confiscatory to so require, but prevent compliance, by terms of a rate order withholding the income necessary to create the reserve.

Public Service Railway Company v. *Board of Public Utility Commissioners*, 96 N. J. Law 54.

(*b*) Arbitrary and unreasonable exercise of power operates to nullify a rate order.

Interstate Commerce Commission v. *Union Pacific Railroad Company*, 222 U. S. 541.

(*c*) Decisions of courts of the highest standing sustain the earned and incurred basis of calculation.

Sun Insurance Office, appellant v. *Clark, respondent* (Appeal cases), Law Reports 1912, p. 443.

Bullion v. *Aetna Insurance Company*, 151 Ark. 519, 237 S. W. Rep. 716.

Insurance Company v. *Page & Richardson*, 17 B. Monroe (Ky.) 412.

Kenton Insurance v. *Covington*, 86 Ky. 213.

Hope Mutual Life Insurance Company v. *Perkins*, 4 Rob. (N. Y.) 182.

Scott v. *Eagle Fire Company*, 7 Paige (N. Y.) 198.

2 Cook on Corporations, 7th Ed., Sec. 546, p. 1609.

6 Fletcher Ency. on Corporations, p. 6104.

III.

The superintendent of insurance in making his rate order did not make the findings stipulated to be made, nor did he base his order on the same, as was stipulated should be done. By such action appellant was relieved from any obligations arising out of the stipulation.

See Argument.

IV.

Appellant is not precluded from its action, nor debarred of interlocutory relief because of waiver or estoppel.

(*a*) Appellant was free, after promulgation of the rate order and prior to the designation of classes, to charge pre-existing rates, nor was its action in doing so unlawful or in violation of any duty it owed the state or the superintendent.

State ex rel. Hyde, Superintendent v. *Westhues*, 316 Mo. 457; 290 S. W. 443.

V.

The court below was in error in its construction of the stipulation. Appellant did not stipulate or agree to repay money to policy holders. The "clean hands" doctrine is not soundly applied to bar relief.

(*a*) The stipulation was not applicable to the present proceeding, but only to the review proceeding. It conferred no new powers on the superintendent and gave no new rights to appellant.

State ex rel. Hyde v. *Westhues*, 316 Mo. 457; 290 S. W. 443.

(*b*) The court below erroneously construed the stipulation as applying to the present suit, which was not *in esse* and not necessarily in contemplation. There was no authority in counsel for the state or the companies to give it the scope which the court below gives it, nor was it within their intention so to do.

Stone v. *Bank of Commerce*, 174 U. S. 412.

(*c*) The attorney general had no power to bind the superintendent to any action contravening the statute and the

superintendent had no powers except those delegated by statute. The court below was in error in assuming that the stipulation was designed to fix the status of insurance rates.

State of Missouri ex rel. Hyde v. *Westhues,* 316 Missouri 457; 290 S. W. 443.

(*d*) The stipulation, that specified bonds would be furnished under directions of the Court in a proceeding not yet existing, could not operate as an estoppel because the duty of the Court was the same, whether the parties stipulated or not, and its action would be pursuant to its inherent powers and not because of the stipulation of the parties.

Swift & Company v. *Hocking Valley Railway Company,* 243 U. S. 281.

(*e*) The stipulation was designed to apply to procedure in the statutory review proceedings only and cannot fairly be otherwise construed. To extend it to other suits not even in contemplation at the time is a violation of the rule that such waivers of constitutional rights should be strictly construed in favor of the preservation of the right.

Burnham v. *North Chicago Street Railway Company,* 88 Fed. Rep. 627.

VI.

The stipulation did not fix the status of insurance rates. The powers and duties of the superintendent were fixed by statute. He could not bargain respecting them. The stipulation therefore was lacking in mutuality and had no binding effect.

State ex rel. Hyde v. *Westhues,* 316 Mo. 457; 290 S. W. 443.

VII.

If the stipulation be construed as a waiver in advance of infringement of guarantees of the Fourteenth Amendment, it is void. Appellant was under duress.

(*a*) A rate order made without notice or hearing is a nullity.

Co. v. *Armour Fertilizer Works*, 237 U. S. 412.

(*b*) A stipulation made with a state official to avoid drastic penalties to escape the results of an unconstitutional rate order is an act under duress and cannot create an estoppel.

Co. v. *Armour Fertilizer Works*, 237 U. S. 412.

Atchison, Topeka & Santa Fe Railway Company v. *O'Connor*, 223 U. S. 280.

Union Pacific Railway Company v. *Public Service Commission of Missouri*, 248 U. S. 67.

Swift & Company v. *U. S.*, 111 U. S. 22.

Robertson v. *Frank Brothers Company*, 132 U. S. 17.

Garr Scott & Co. v. *Shannon*, 223 U. S. 468.

VIII.

A stipulation was made by attorneys representing all stock insurance companies en masse. It did not and could not bind the several insurance companies to forego assertion of individual infringement of constitutional right thereafter accruing.

(*a*) Confiscation may be asserted when it exists, regardless of previous actions or agreements of the party to whom confiscatory action is thereafter applied.

Banton v. *Bell Line Railroad*, 236 U. S. 414.

(*b*) An agreement in advance that a party will in the future refrain from asserting his constitutional rights if invaded, is a nullity.

Insurance Company v. *Morse*, 20 Wallace 445.

Barron v. *Burnside*, 121 U. S. 186.

Doyle v. *Continental Insurance Company*, 94 U. S. 535 (dissenting opinion subsequently adopted as law in *Terral* v. *Burke Construction Company*, 257 U. S. 529, 533).

Southern Pacific Company v. *Interstate Commerce Commission*, 219 U. S. 433.

McFarland v. *American Sugar Company*, 241 U. S. 79, 85.

Union Dry Goods Company v. *Georgia Public Service Corporation*, 248 U. S. 372; 9 A. L. R. 1420.

IX.

The Missouri Rating Statute violates the equal protection clause of the Fourteenth Amendment, in that it regulates rates of stock fire insurance companies and does not apply to other insurers doing an identical business.

Hanover Fire Insurance Company v. *Harding*, 272 U. S. 494.

Quaker City Cab Company v. *Pennsylvania*, 277 U. S. 389.

X.

The rate fixing here under review is an unconstitutional invasion of right. If it may be justified by the ruling in German Alliance Insurance Company v. Lewis, 273 U. S. 389, then the decision in that case should be modified.

Tyson & Brothers United Theatre Ticket Offices, Inc. v. *Banton*, 271 U. S. 418.

Doyle v. *Continental Insurance Company*, 94 U. S. 534 (minority opinion).

(*a*) The statute as construed and applied to appellant trenches upon its rights and is beyond appropriate exercise of police power.

Welsh v. *Maryland Insurance Company*, 47 Okla. 933; L. R. A. 1915-E, 708.

Northwestern National Insurance Company v. *Fishback*, 130 Wash. 490.

United States v. *Cohan Grocery Company*, 255 U. S. 81.

XI.

The questions here involved are of such importance they should not be determined adversely to apppellant on interlocutory hearing.

See Argument.

(*a*) The court below erred in assuming that the superintendent was a rate maker, which would extend his powers beyond legitimate police powers. In fact the statute did not, when properly construed, give him rate making powers.

State ex rel. Hyde v. *Westhues*, 316 Mo. 457.

XII.

The condition imposed for consideration of the application for injunction,—namely return of 10% of all premiums collected from November 15th, 1922, to date,—is arbitrary and an abuse of discretion.

Rev. Stat. Mo., 1919, Sec. 6283.

See Argument.

ARGUMENT.

I.

The application of the Missouri Insurance Rate Regulation Statute to plaintiff, through the medium of the rate order, operates as a denial of due process of law in violation of the rights of appellant under the Fourteenth Amendment of the Constitution of the United States. The court below abused its discretion in denying appellant's application for an interlocutory injunction.

The bill in chancery in this case discloses that the experience of the appellant for five years before the date of the rate order in question, which is the statutory experience term and a reasonable test period, was as follows (R. 11):

Income (earned premiums)	$2,024,766
Outgo (incurred losses and expenses)	$2,330,251
Excess of outgo over income	$ 305,485

Had the reduction in question been applied during such period, the excess of outgo above income would have been almost double.

During the six years since the date of the rate order, the experience of the appellant in Missouri (without applying the reduction) has been as follows (R. 11, 46):

Income (earned premiums)	$3,501,540
Outgo (incurred losses and expenses)	$3,702,496
Excess of outgo above income	$ 200,956

It is expressly alleged that the appellant has an established business and that it is an economically, soundly man-

aged and prudently conducted insurance company. (R. 10.) The experience of the appellant is not isolated, but the experience of other insurance companies similarly situated in the State of Missouri resulted in a loss on their part during the five-year test period before the date of the rate order,—outgo of approximately 110 per cent of income. (R. 6.) Their experience during the six years following the date of the rate order has been productive of an outgo of about 109 per cent of income. (R. 91, 92.)

The court below expressly found that the defendants offered no evidence whatever to refute the claim of confiscation. (R. 127.)

The superintendent of insurance directed a rate reduction to be applied to appellant which is a company properly conducting its business and conducting it at a loss, (such loss not being an exceptional or peculiar situation but a situation which exists likewise respecting other companies doing like business in Missouri). An order reducing rates under such circumstances is confiscatory and an unconstitutional invasion of the rights of appellant under the due process clause of the Fourteenth Amendment of the Federal Constitution.

A prescribed rate which permits no return whatever to the operator of the business is confiscatory.

Bluefield Water Works and Improvement Co. v. *Public Service Commission,* 262 U. S. 679, 690.

The proof on the part of appellant was clear. The court below found that if appellant should refrain from collecting pre-existing rates and should make a reduction of ten per cent, recovery thereof from policy holders thereafter would be impracticable, if not impossible, and "the expense thereof is prohibitive when the amount of recovery is considered." (R. 128.)

The case falls clearly within the rules declared in *Ohio Oil Company* v. *Conway,* (not officially reported) 49 S. C. Rep. 256, where it is said:

> "Where irreparable injury will result and the opposing party may be indemnified by a bond, and the questions presented by the application are grave, an interlocutory injunction should issue, and its denial is an abuse of discretion."

The court below, while conceding the adequacy of the case of the appellant and the showing made by it as requiring an interlocutory injunction, except for existence of the stipulation in question, (which will be discussed in later sections of this brief), did criticize the basis of *earned* premiums as income and *incurred* losses and expenses as outgo, expressing a preference by the Court for the basis of premiums *paid* and losses and expenses *paid.* That this was not controlling with the Court, however, is indicated by the fact that the court below granted an interlocutory injunction to forty-one companies not parties to the stipulation, who made a contemporaneous application for interlocutory injunction upon bills identical in their nature. (R. 128.)

Phases of the argument dealing with the propriety of earned premium basis and effect of the stipulation, presenting readily separable points of argument, are considered under divisions of the argument *postea.*

The statute and the rate order purporting to be made pursuant to it are unconstitutional infringements of right of the appellant in so many particulars that it is impractical to argue them all at length in this brief. It is our view that on interlocutory hearing, such as the present, the Court should not be burdened with the detail of them, and that it should serve every purpose to call them to the Court's attention, so that the Court may be advised that they are serious matters worthy of preservation to a final hearing,

by granting of an interlocutory injunction to preserve the existing status until they can be determined upon a fuller hearing.

The constitutional questions involved, and which we urge are ample to warrant the granting of an interlocutory injunction and reserving such questions for final determination upon ultimate decision of the case, are:

(*a*) The statute of Missouri (Rev. St. Mo. 1919, sec. 6283) makes no provision for any notice or hearing to appellant and other insurance companies before the making of a rate reduction order. The court below held:

> "We need not inquire whether such notice and hearing is a legal requirement, because neither the wording nor any proceeding thereunder prevents such notice and hearing, and both were accorded in this instance."

The granting of notice and hearing as a matter of grace and because of private agreement that it shall be had, such as was provided in the stipulation in question, does not remedy the defect in the statute. The view which the court below expressed as above is squarely contrary to the holding of this Court in *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 424, 425. The point is specifically raised by the sworn bill of complaint. (R. 18.)

(*b*) The decision of the court below in effect holds that the insurance superintendent is the manager of the business of appellant and, if its ruling be correct, takes the management of the business out of the hands of the officers of appellant. It is a regulation not warranted by the police power, which point is fully set up in the bill of complaint (R. 12) and presented more fully in Point X of this brief.

(*c*) The statute, by its terms, is made to apply to stock fire insurance companies, and exempts other insurers similarly situated and doing a like business. This point is expressly made in the bill of complaint (R. 16-19), and is further presented under Point IX of this brief.

(*d*) The statute as construed and applied authorizes the adoption of premiums received basis, thereby taking unearned premium into account as an element of income in fixing a just rate. This is fully presented in the bill of complaint (R. 13) and elaborated in the affidavits filed on the hearing. (R. 66.) The effect of such action is to deny appellant income wherewith to set up a reserve for unearned premiums, altho by the statutes of Missouri (Rev. St. Mo. 1909, Sec. 7013; Ins. Laws Mo. (1927) Sec. 6222) appellant is required to set up a reserve which it is prohibited from using to pay dividends or otherwise employ the funds for corporate purposes. R. S. Mo. 1909, Sec. 7064; Ins. Laws Mo. (1927) Sec. 6333.

(*e*) The statute as applied by the rate order eliminates from expense commissions in fact paid and which the court below holds were properly paid and subject to be taken into account as justifiable outgo. The facts respecting this matter are fully set up in this bill. (R. 15, 16.) The court below, while sustaining the position of the appellant that such arbitrary and confiscatory method was employed by the superintendent, nevertheless denies relief against such confiscatory action.

(*f*) It is alleged in the bill and admitted herein that the superintendent included interest on investments as an item of income and thereby employed income of appellant derived from a distinct department of its business as income applicable to its underwriting department. The matter is fully set forth in the bill of complaint. (R. 6, 13, 26-28.) The position of the appellant was sustained by the court below, in that the court below holds that such item was improperly taken into account (R. 123), nevertheless interlocutory injunction is denied to the appellant.

(*g*) The bill alleges, and it is admitted, that the superintendent in making his rate order gave no consideration to

the individual experience of the appellant (R. 5-11), and that upon the experience of the appellant its business had been conducted over a long period of years at an actual loss, nevertheless it is subjected to a further reduction of income. (R. 5-11.) The established nature of the business of appellant (R. 3), the day by day confiscation resulting from the application of the statute through the medium of the rate order (R. 33), and the fact that the rights of policy holders and others entitled to protection could be adequately safeguarded by requirement of bonds and that an irreparable injury would result to appellant if application for interlocutory injunction be denied are all uncontradicted facts in the record.

(*h*) The court below imposed a condition upon even considering application for interlocutory injunction, that refund down to the rate prescribed by the rate order be made from November 15, 1922 forward to date (R. 108, 109, 129); whereas the rate order was not effective so as to require any reduction (even if its validity and constitutionality be conceded) until February 1, 1928. This point will be found treated under Point XII of this brief.

II.

A sound insurance profit and loss calculation can be made only upon the basis of earned premiums as income and incurred losses and expenses as outgo. It is unsound to state a supposed profit on the "paid" basis. Such method is arbitrary and fundamentally unsound.

It is the position of the appellant that the basis presented in the bill, that of earned premiums as income and incurred losses and expenses as outgo, is sound. If the question were one of serious doubt, the Court should, nevertheless, grant an interlocutory injunction and await the evidence to be

presented upon the hearing of the case in coming to appropriate conclusions.

It may well be that evidence of accountants and others skilled in giving the Court reasons for adoption of one basis rather than another may prove of controlling aid.

The plaintiff's case respecting income and outgo was set up in the bill of complaint on the basis of *earned* premiums as income and *incurred* losses and expenses as outgo. The court below in its opinion, indicated dissent from this basis and inclination to favor the basis of premiums *received* as income, and losses and expenses *paid* as outgo. In this view the Court was in error, but we shall not argue the matter at length, as the decision below was not based upon such view of the Court, the Court holding that as to companies not parties to the stipulation, it would grant an interlocutory injunction, notwithstanding the basis was one which the Court was inclined to disapprove. This action of the Court was doubtless upon the premises that the matter was one more properly to be determined definitely upon final hearing to which time the Court reserved that question. It is the fair intent of the opinion that (irreparable damage resulting if an injunction be not issued and the matter being one of doubt whether one basis or the other was proper for adoption), the Court upon consideration of the balance of injury determined (except for stipulation) to grant an interlocutory injunction, reserving the question of the proper basis of profit calculation for further consideration in a final decree. (R. 127.) The record discloses an exhaustive affidavit of Charles R. Street (R. 66) vice president of Great American Insurance Company, which states that such basis is universally employed by all insurance companies in their profit and loss calculations and has been so employed for forty years. (R. 67.) The Court will find by the evidence presented (R. 66-83) that the terms employed are defined

and explained in the affidavits (R. 67), and that the basis of earned premiums as income and incurred losses and expenses as outgo is sound and no evidence to the contrary was adduced. Considerations supporting soundness of such basis appear in the affidavits in the record. It there appears that the employment of earned premiums and incurred losses and expenses as a basis for insurance profit calculations is sound because:

(*a*) It is universally employed by insurance companies and recognized as sound. (R. 68.)

(*b*) It is prescribed in the annual statement blanks prepared by the respective insurance superintendents of each of the forty-eight states of the Union, upon which basis fire insurance companies report profit and loss to such states. (R. 68.)

(*c*) The earned and incurred method of calculation of insurance profit is prescribed by acts of Congress for reporting insurance profit under income tax law of the United States. (R. 69.) The act in this particular has remained identical since its enactment in 1921, differing only as to the section numbering, and so appears as:

U. S. Revenue Act, November 23, 1921, Section 246.
U. S. Revenue Act, June 2, 1924, Section 246.
U. S. Revenue Act, June 2, 1924, Chapter 235, Section 247, 43 Stat. 290.
U. S. Revenue Act, February 26, 1926.
44 U. S. Statutes at Large, Title 26, Section 1006.
U. S. Revenue Act, May 29, 1928, Chapter 852, Section 206, 45 Stat. 846.

The terms are there defined as follows:

"(4) The term underwriting income, means the premiums earned on insurance contracts during the taxable year, less losses incurred and expenses incurred."

Section 5 defines the method of calculating premiums earned, which is in exact accord with the method here employed and described in affidavits in the record. The method of computing losses incurred is prescribed in Paragraph 6, and the method of computing expenses incurred is prescribed in Paragraph 7,—each of which is in exact accord with the method employed herein.

The statute in question, by paragraph numbered 1, provides that the income earned shall be "computed on the basis of the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners." This annual statement form is employed in the State of Missouri and is described in the affidavits in this case as "annual statement." (R. 68.)

(*d*) The statutes of Missouri prohibit employment of unearned portion of the premiums in payment of dividends or other corporate purposes. (R. 69.)

(*e*) After two years' consideration of the subject by a committee from fire insurance companies consulting with the insurance commissioners of the various states of the Union, the insurance commissioners' convention declared earned premiums and incurred losses and expenses to form the proper basis of profit calculation. (R. 69.)

(*f*) It is a sound method of accountancy, universally employed in the business world, and not peculiar to insurance, in that if money is paid in advance for services to be rendered in the future and service and goods for future delivery have not yet been delivered, sound accountancy and common honesty require that money so paid in advance for service still to be rendered be set up as a liability for the unperformed or undelivered portion of the contract. (R. 71.) It is peculiarly applicable to the business of fire insurance because policies are subject to cancellation and return of unearned premium at any time by express provisions of the

policies. The earned premium method contemplates assigning to any period of time for which a profit calculation is to be made of such pro-rata of premiums on all policies, (whether written before or during such period) as pays for indemnity during such period, namely the taking that proportion of the premiums of each such policy which pays for the insurance during such period.

(*g*) There is an element of marked error in employing the received and paid method, because policies are commonly written for three and five-year periods, and if written during the test period, a great part of premium on such policies paying for indemnity beyond the test period are nevertheless taken into account as if they were income, although not paying for indemnity during the period; and as to policies written prior to the test period their entire premium is rejected, although a part thereof pays for indemnity during the test period. (R. 71.)

The method employed by the superintendent of insurance of Missouri in making the rate order in question, approved and confirmed as to such application by the Supreme Court of Missouri, authorized the superintendent of insurance as a justifiable construction of the statute, to include as an element of income the unearned portion of premiums collected during a given period and measure the adequacy of rates with such element included.

The statutes of Missouri specifically provide that every fire insurance company doing business in that state shall annually set up and show "the liabilities of the company as follows * * * fifty (50) percent of the gross premium on all unexpired fire risks that have less than one year to run, and a pro rata of all gross premiums on risks that have more than one year to run." (This is the basis for which appellant contends.)

R. S. Mo. 1909, Sec. 7013; Insurance Laws of Missouri, (1927) Sec. 6222.

The deduction of the unearned premium as a liability is one step of a calculation that leads to the surplus, and it is further provided by the statutes of Missouri that "it shall not be lawful * * * to make any dividend except from the surplus profits arising from their business."

R. S. Mo. 1909, Sec. 7064; Insurance Laws of Missouri, (1927) Sec. 6333.

The statutes of Missouri prescribe that the entire unearned premium be reserved and set aside and not treated as surplus subject to dividends or other corporate uses. By the rating statute, as construed and applied, the unearned premiums are treated as income and considered as if they were profits. The net effect of such contradictory positions is to deny to appellant the right to an income adequate to set up its required reserve and have anything left in addition thereto.

A like situation was before the Supreme Court of New Jersey, reviewing a suspension of an increased street car rate. The decision referred to is that of *Public Service Railway Co.* v. *Board of Public Utility Commissioners,* 96 N. J. Law 54, s. c. 114 Atl. Rep. 323. The railroad carrier in that case was required by order of the Commission to preserve a depreciation account, and the railroad accordingly carried such a reserve; but in determining the adequacy of rates, their sufficiency was determined without making provision or taking such reserve out before reaching the point of profits. The Court, in condemning such action as confiscatory, said:

> "To make an order requiring a public utility to set apart, yearly, a depreciation fund of a fixed amount, and to prevent a compliance by refusing the income necessary for that purpose is not the fixing of a just and reasonable rate."

The adoption of the written or paid method calculation, thus treating as profits the entire unearned premium and

making no allowance for reservation of it out of income, is an arbitrary and unreasonable exercise of power. When power is arbitrarily and unreasonably exercised it makes the whole order a nullity.

Interstate Commerce Commission v. *Union Pacific Railroad Co.*, 222 U. S. 541, l. c. 547.

The propriety of setting out a reserve for unearned premiums as an appropriate method of setting up a profit and loss statement does not rest upon first impression but has the sanction of the Courts.

Courts of the highest standing have sustained the propriety of the earned and incurred basis as a sound method of measuring profit and loss of an insurance company. We shall note the cases but briefly, for the reason that the court below did not deny interlocutory injunction to the appellant because of adoption in the bill of such basis. The conclusion of the court below was that the adoption of such basis was not an adequate ground for denying an interlocutory injunction (R. 127) and that if there be any doubt upon the subject, it should be resolved in favor of the applying insurance company. The cases which bear upon the subject briefly reviewed, are:

Sun Insurance Office, appellant v. *Clark, respondent,* (Appeal Cases, Law Reports, 1912, p. 443).

The decision by the House of Lords. It was a case arising under an assessment under Income Tax Act of 1853 in England. The tax was imposed by the intermediate court of appeal upon the whole premium income of the company for the given year, altho the proof disclosed that the company had a large number of policies extending beyond the year in question. It was the contention of the insurance company that only the earned premium should be considered because the unearned portion in no way entered into its appropriate profit and loss statement. The contention there made on

behalf of the insurance company is stated at page 446 of the opinion as follows:

> "The contention of the appellants is that as regards the risks which do not expire at the end of the financial year, the premiums received are unearned premiums, and therefore cannot be treated as profits, and that a certain percentage of the premium income ought to be carried forward in respect of unearned premiums."

The Court, per Viscount Haldane, says:

> "As Bray, J. puts it, the case is analogous to one in which if goods are bought, their value cannot be treated as profit without deducting the value of the liability to pay for them which the buyer has incurred."

Lord Atkinson in a concurring opinion says:

> "If the accounts of the company are to be rendered before the date of expiry, then some division of the premium must be made, and the portion to be appropriated to the service already rendered ascertained, the balance being appropriated to that portion of the service which is to be performed thereafter. I think the description 'unearned premium' which has been used to describe this latter portion is a very appropriate and accurate description." (pp. 460, 461.)

The contention of the insurance company is sustained and that of the crown for a received and paid basis disapproved.

In the case of *Bullion* v. *Aetna Insurance Company*, 151 Ark. 519; 237 S. W. Rep. l. c. 718, the Court in sustaining the earned and incurred method of calculating insurance profits as against a rate order says, that the unearned portion of the premium must be rejected from the accounts in setting up a profit and loss statement, and respecting such unearned portion of the premium says:

> "It is not a profit, for the simple reason that it is not earned. It may never be earned. The company could not use it for paying dividends or for other purposes of its own."

As we consider the question one upon which the decision below did not turn, we shall not make further quotation from the many cases establishing the propriety of the earned and incurred method of calculation, but content ourselves with citing them to the Court, so that the Court may examine them if it deem proper. The principal cases sustaining such basis are:

Bullion v. *Aetna Insurance Company*, 151 Ark. 519, 237 S. W. Rep. 716 loc. cit. 718.

Sun Insurance Office, appellant v. *Clark, respondent*, Appeal cases, Law Reports, 1912, p. 443 (House of Lords).

Insurance Company v. *Page & Richardson*, 17 B. Monroe (Ky.) 412.

Kenton Insurance Co. v. *Covington*, 86 Ky. 213.

Hope Mutual Life Insurance Co. v. *Perkins*, 4 Rob. (N. Y.) 182.

Scott v. *Eagle Fire Company*, 7 Paige (N. Y.) 198.

2 Cook on Corporations, 7th ed. Sec. 546, p. 1609.

6 Fletcher Encyclopedia on Corporations, p. 6104.

III.

The superintendent of insurance in making his rate order did not make the findings stipulated to be made, nor did he base his order on the same, as was stipulated should be done. By such action appellant was relieved from any obligations arising out of the stipulation.

The court below denied an interlocutory injunction to the plaintiff solely upon the basis of the stipulation above set out, which was presented in affidavit produced on the hearing. For the purposes of this division of our brief, the binding effect of the stipulation is assumed.

At the time of the hearing, the only pleading in the case was the verified bill of complaint, in which this stipulation is not set forth. The court below had an entire misconception of the stipulation and its effect. The stipulation was made before the rate hearing or order here in question and was in contemplation of a future hearing and rate order thereafter to be made.

The stipulation provided that certain findings of fact should be made by the superintendent should he thereafter make any rate order. He was to find, among other things (R. 102):

> "(*e*) * * * The ratio of expenses incurred to premiums earned * * *."
>
> "(*f*) * * * the ratio of losses incurred to premiums earned during the test period."
>
> "(*g*) * * * the total amount of earned premiums during said period."

Whatever obligations were to arise against the insurance companies are immediately thereafter recited conditionally, viz:

> "(3) That if, *based upon such findings of fact*, * * * an order reducing the rates charged * * * be made," etc. (R. 102.)

then the burdens of the stipulation thereinafter recited, should fall upon the insurance companies. It is to be noted that it was *only in the event* that the rate order was "*based upon such* findings of fact," namely, based upon earned premiums, incurred losses and incurred expenses, that any obligations on the insurance companies should arise. It appears by the rate order and the undisputed allegations of the verified bill respecting it, that the superintendent made his order on the *received* and *paid* basis, and not upon *earned* premiums and *incurred* losses and expenses. He was justified by the Supreme Court of Missouri in expressly rejecting such basis. (R. 5-11.) The court below also justifies

his rate order upon a basis rejecting any finding or conclusion upon the earned and incurred basis. (R. 126.) The adoption of such earned and incurred basis having been made a condition on which the obedience to the provisions of the stipulations were to rest upon the insurance companies and such predicate being lacking, there was no obligation, moral or legal, upon the insurance companies to obey a rate order made upon a basis directly opposed to that provided in the stipulation (R. 102), and relied upon in the bill of complaint. (R. 4, 11.) In the affidavit of Paul Terry filed on the hearing, it was stated:

> "The Superintendent did not, either in his reduction rate order of October 9th, 1922, or otherwise, make the findings specified in subdivisions (*a*) to (*g*) of Paragraph 2 of said stipulation above quoted." (R. 88.)

Paragraphs (*e*) to (*g*) expressly relate to the earned and incurred basis of computation upon which, by the stipulation, his findings were to be based. The affidavit of witness Terry that the superintendent did not make the findings as to earned premium and incurred losses and expenses as provided in the stipulation, is uncontradicted.

The statutory Court, however, draws the conclusion that, although the superintendent did not base his order upon the earned and incurred basis, nevertheless "the second purpose was substantially carried out." (R. 104.) Such second purpose as recited by the Court (R. 103), is the conduct of the hearing and findings to be made by the superintendent on such essential matters. There is no evidence whatever to sustain the conclusion of the Court so quoted. Under the undisputed record, the superintendent who asserts estoppel did not make findings or adopt the basis prescribed in the stipulation. To the contrary he adopted the *received* and *paid* basis and rejected the earned and incurred basis. Which basis shall be employed is fundamentally important. The purpose was not "substantially carried out" nor car-

ried out at all. It was expressly rejected by the superintendent. The court below erred to the injury of appellant in its conclusions.

It is anomalous to say that an estoppel exists against appellant to complain of a rate order because it stipulated to abide thereby under certain contingencies when those contingencies fail by default of him who asserts the estoppel. The chief attack by appellant upon the rate order is that the earned and incurred basis was not adopted, no findings made under it, that it was expressly rejected and that such basis is the only sound one to follow. It is now held estopped although it has consistently adhered to such basis. The superintendent is held entitled to assert an estoppel although he failed and refused to follow the conditions stipulated for which were made a *sine quo non* of the stipulation.

IV.

Appellant is not precluded from its action, nor debarred of interlocutory relief because of waiver or estoppel.

The Court concludes that it is unnecessary to retain this issue (whether or not the superintendent rejected the stipulation) to final hearing because "such deficiency (not making the findings and basing the rate order thereon), if it existed, was waived by the companies." (R. 105).

The Court concedes that if the companies were dissatisfied with the findings and basis employed by the superintendent, they could thereafter "freely take such action as they desired," which is what appellant did. This waiver, the Court says, was made by the insurance companies in that "they elected to proceed in accordance with the stipulation." (R. 105). There is not a scintilla of evidence to sustain this view, in the aspect in which we view the record. What the Court apparently means by this statement is indicated

by that which immediately follows in the opinion. There the Court says:

> "They not only (*a*) initiated the statutory review proceedings * * * " etc.

This was a statutory right and in no way dependent upon or an act of affirmance of any stipulation. It was action entirely consistent with the right conceded by the Court to exist, viz: to "freely take such action as they desired."

The Court says that waiver is further shown by the fact that appellant:

> "(*b*) omitted any attack upon the validity of the statutes or the legality of the proceeding before the superintendent."

There is no evidence whatever that such an attack was omitted. In fact, attack was made but the Courts held that such attack could not be considered because of the joint nature of the proceedings. (*Aetna* v. *Hyde*, 275 U. S. 440).

The Court says that appellant:

> (*c*) "gave the bonds stipulated and collected the premiums stipulated."

The only bonds given by appellant were those given by it with other companies in the review proceeding, as a condition of collecting excess premiums during the pendency of the suit. The only fact in the record bearing on the reasons actuating their execution is the allegation that they were "upon the order and requirement of the court" in the review case. (R. 7.) The conclusion drawn by the Court was:

> "Therefore, we must regard the matter before the Superintendent as having been fully performed in *a legal sense* by the Superintendent in accord with the stipulation, because the only alleged failure upon his part has been waived."

We respectfully submit that there is no basis whatever for asserting waiver because of pursuing the review given by the statute, or because of giving a bond on conditions exacted by the Court. In place of appellant waiving the

earned and incurred basis by such proceedings, it in fact asserted them vigorously in the courts and has never at any time, abided by the superintendent's action in discarding and refusing to employ them. We fail to see how waiver can possibly flow from a continuous attack by insurance companies upon the action by the superintendent in rejecting a basis which the stipulation provided should be employed. Neither is there any ground for saying that premiums at former rates were collected pursuant to or in affirmance of the stipulation. No act or omission of appellant is shown which was not completely warranted, regardless of the stipulation.

The Court in its opinion below, stresses the fact that the plaintiff has collected the excess rates (namely the difference between the amounts directed by the rate order and the reduced amount which would have been collected had the ten per cent reduction been applied), and the Court recites the collection and retention of this money as a consideration for the stipulation. The Court says:

> "The claim that the Superintendent had no power to agree to collection and retention of the excess pending the stipulated review, is *beside the point*, because the companies have received the entire benefit of that collection, which is fully executed. We have no doubt as to the sufficiency of the consideration."

The Supreme Court of Missouri in the case of *State ex rel Hyde, Superintendent of Insurance* v. *Westhues, Circuit Judge, respondent*, 316 Mo. 457, 290 S. W. 443, found that the power to exact and receive such excess existed in the insurance companies, irrespective of the stipulation. It was there held that the statute provides for no enforcement and does not expressly provide that in case of a reduction the companies must collect the lesser sum. It is said in that case:

> "With respect to such a reduction order, the statutes contains no specific provisions for its enforcement. The

insurance companies are not commanded to make their business rating records conform to it; they are not, in terms at least, prohibited from thereafter charging rates in excess of those fixed by the order. Nor is there any express provision making it unlawful to charge and collect the rates as they stood prior to the making of the order."

The *collection* and retention of the excess *was not pursuant to the stipulation*, but pursuant to independent power regardless of the stipulation. That the superintendent had no power to make such a stipulation is not "beside the point." It is of controlling importance. The companies collected the excess because of independent power and not because of the stipulation. If the stipulation is a nullity as the Court below virtually asserts, then no estoppel can be based upon it. It would be a poor consideration moving to appellant, if the appellant should be held estopped "because of the companies having received the entire benefit," if it cannot question the constitutionality of the rate order and the statute without first *refunding the entire amount so collected*,—which is what the Court below requires. What benefit remains to the companies if they return all they have received, before they can even be heard? The decision of the Court below in effect is that:

Firstly: By collecting the excess the appellant has received a benefit which estops it from complaining. (If the rate order is confiscatory in fact, then appellant has received nothing but that to which it was entitled);

Secondly: If the order and the statute are both void appellant must nevertheless, irrevocably forego this sum by refunding it and putting it beyond its own power to recover it as a condition of setting up the claim of unconstitutionality;

Thirdly: Having so done, let it be assumed that its claim of unconstitutionality is sustained; it is then to be given the empty determination that the money surrendered was its property and it should never have been deprived of it.

All this upon a supposed ground of waiver, whereas no intent existed on the part of appellant to waive its rights and no one has acted to his injury upon the mistaken belief that appellant did make waiver.

V.

The court below was in error in its construction of the stipulation. Appellant did not stipulate or agree to repay money to policy holders. The "clean hands" doctrine is not soundly applied to bar relief.

The opinion of the court below proceeds upon the untenable premise that by the terms of the stipulation, the plaintiff agreed to repay money to policyholders and the Court says:

> "Nothing remains to be done by anyone under the stipulation except for the companies to repay the 10% excess of premiums collected to those from whom they were collected. One of the expressed purposes of the present complaints is to prevent this repayment." (R. 105).

The Court evidently proceeds upon the assumption that the stipulation makes explicit provision that the plaintiff will repay money to policyholders. The assumption is baseless.

The stipulation provides that if a rate reduction order be made, based upon the findings of fact as regards earned premiums and incurred losses and expenses, and the companies be dissatisfied they will proceed "to secure a review thereof by a trial *de novo* in the Circuit Court of Cole County, Missouri." The entire stipulation is limited to what is to be done in such review proceeding and not any action independent of or subsequent to the review proceeding. Immediately following the words last quoted are the words "That

no injunction shall be applied for *in said matter.*" This necessarily refers to the review proceeding and all of Section 4 of the stipulation (R. 102) refers exclusively to the conduct of the parties *in the review proceeding,* the provisions being that "in said matter," namely the review proceeding:

(*a*) No injunction shall be applied for;

(*b*) "until the final determination of *said* cause" the old rate should be in force;

(*c*) the insurance companies "shall give bond conditioned and in such amount as the court may direct to refund to the assured any excess of premium collected by them, if such order * * * be finally sustained by decree or judgment of a court of last resort."

By Section 5 of the stipulation it is provided "that *in such matter* the question of constitutionality" shall not be raised. This was no more than prescribing a course of conduct of a review proceeding, in which two conditions were exacted as against the insurance companies; *first,* that no injunction was to be applied for in the review proceeding, and *secondly,* that a bond conditioned as the Court might direct should be furnished. No injunction was asked for in the review proceeding and bonds were given as directed by the Court. (R. 7). These were the only burdens that rested upon the insurance companies. Having complied with these conditions appellant is in no sense in default as to any burdens of the stipulation, even if the stipulation be binding and enforceable against it.

This identical stipulation here under consideration was before the Supreme Court of Missouri upon appeal from a contempt order in an injunction suit formerly pending in the State Court. That court, in the case of *State, ex rel Ben C. Hyde, Superintendent of Insurance* v. *Westhues, Circuit Judge, respondent,* 316 Mo. 457, 290 S. W. 443, sets forth the stipulation now under consideration verbatim and says:

"After providing for the final disposition of the cause in which it was filed, the stipulation dealt solely with

the new order and the new court proceeding to review it, which the parties then had in mind. The agreement conferred no new powers on the Superintendent of Insurance with respect to making a rate reduction order; it gave the insurance companies no additional right in respect to having such an order reviewed in a court of competent jurisdiction."

This bears out our view that the stipulation relates only to procedure in a contemplated review proceeding, all of which has been accomplished and performed and that the rights exercised by appellant were statutory and not by virtue of the stipulation.

The Court however, in the case at bar, seeks to extend this stipulation to a much broader view and to hold that it affirmatively imposes on the appellant the duty of refunding moneys respecting which the stipulation contains no provision whatever. The finding of the court below that appellant comes into equity with "unclean hands" is an unsound conclusion.

The very gist of the opinion of the court below is in the statement that they (appellant and other insurance companies) stipulated that if that litigation (review proceeding) were unsuccessful, they would repay the excess premiums collected under the stipulation. They are coming into a court of equity with unclean hands because they stand as beneficiaries under a stipulation respecting this very matter and which they refuse to carry out.

A complete answer to this statement is that there is no such agreement or provision in the stipulation. It is neither there expressly, nor by inference. The Court, after discussing the doctrine of coming into equity with clean hands, says that the plaintiff "should comply with the stipulation and make their refunds *required thereby* before asking any equitable relief. When that status has been fully established, they will be in position to proceed to have their rights determined and protected, and not before." (R. 108).

There is no term of the stipulation which can be pointed to with which the plaintiff has not complied or which it has in any way breached. There is a provision in that stipulation that bonds shall be given by the interested companies upon certain terms, which bonds were given, but there is no provision in the stipulation in any place providing for a refund to anyone.

After holding that refunding the money is a condition precedent to applying to the court, the Court says it is urged that if refunded and the order were later held unconstitutional, the money could not be recovered back. The opinion concedes that if appellant should repay to policyholders as the Court says it must as a condition of being heard at all "recovery would be impossible, or at any rate highly improbable." (R. 109). The conclusion of the Court immediately following this is most astonishing, where it is said:

> "* * * But such results is no reason for granting the injunctions."

In other words, although irreparable damage will necessarily or probably result from not granting the interlocutory injunction, and plaintiff has a case in its bill, yet relief should be denied. The Court predicates this ruling upon the premise that:

(*a*) The stipulation imposes certain conditions for refund on the plaintiff; (in which conclusion we do not agree);

(*b*) That the Superintendent has fully performed the stipulation; (which is squarely contrary to the uncontradicted evidence upon this hearing);

(*c*) That appellant has violated the stipulation (which we deny).

At the time the stipulation was made there was no suit of any kind pending, affecting the National Fire Insurance Company. The suit, which had been pending and was dismissed when the stipulation was made, was a joint proceed-

ing by all the fire insurance companies doing business in Missouri to enjoin the rate order. That suit was dismissed and the rate order vacated. Of necessity that rate order had to be vacated because it had been made without notice of any kind and was a complete nullity and this was so recognized by the attorney general. The stipulation which was entered into was respecting procedure to be followed in a statutory proceeding, providing for hearings *en masse* upon aggregate experience. It was to be an order pertaining to rates generaly without weighing or considering the experience of any individual company, and the question of confiscation or infringement of rights of individuals (as distinguished from their rights en masse) was not in consideration. There was no authority from the individual companies in such litigation to the attorneys to waive in advance any individual confiscation which might be created by the rate order. It could not be known in advance but that the superintendent would order insurance to be written for nothing. It was neither the intent on signing the stipulation that resulting confiscation was in any way waived; neither was there any power or authority in the attorneys nor intent to make such waivers for individual insurance companies. A retainer to vacate a specified rate order not directed against individual companies, by making an order affecting rates in the aggregate for all companies in the state, gave no power or authority to the attorneys representing them in such proceeding to waive their individual complaints respecting unconstitutionality of statute or confiscatory nature of rate order which might arise out of subsequent proceedings not yet initiated. That they might agree for procedure in a hearing which would determine only the aggregate experience, and not involving constitutional inquiries, might be considered as within their authority. That they could take any action which could bar the present proceeding was clearly beyond their authority and outside the intent of the attorneys or principals on

either side. The legal aspects of this situation are exemplified by the case of *Stone* v. *Bank of Commerce,* 174 U. S. 412. It is to be noted that the provisions of the stipulation are anticipatory of a rate hearing, a rate order and possible litigation which may come thereafter. As was said in the *Stone case*:

> "An attorney in his capacity merely as such, has no power to make any agreement for his client before a suit has been commenced or before he has been retained to commence one. Before the commencement of a suit or the giving of authority to commence one, there is nothing on which the authority of an attorney to act for his client can be based."

The stipulation here as construed by the court below is an undertaking to regulate governmental policy of the state for the future. The attorney general had no power to bind the state in contravention of the statutes. As was said in the *Stone case*:

> "When the agreement was made no suit had been commenced by any of the parties; no litigation in regard to matters in dispute was pending. Prior to the making of the agreement it was a question altogether in the future as to what means should be adopted and what suits commenced for the purpose of establishing the rights of the various parties as claimed by them. The question as to what course should be pursued was not one of law only,—it was also one of policy. The stipulation actually entered into was of an administrative, as well as of a legal nature, involving the administration of the law regarding taxation and the best means of determining the legal questions involved in the dispute, while at the same time obtaining, so far as possible, payment of the taxes claimed by the commissioners of the sinking fund as due from the various banks and trust companies. These were questions which an attorney would have no power to decide and concerning which he would have no power to make any agreement." (loc. cit. 421).

The Court also says:

> "When an attorney has been retained, he has certain implied powers to act for his client in a suit actually com-

menced in the due and orderly conduct of the case through the courts. * * * Nothing of the kind exists in the agreement here in question. It is more than a mere agreement of an attorney to abide the event of a decision in an actually existing suit. This agreement was not in the execution of the general power of any attorney to decide upon the proper conduct of a suit then on its way through the courts. It was an agreement much more than that and of a different nature. As we have said the question to be determined was one of policy, as well as of law, eminently one for the consideration of the city authorities, its mayor and its general council, aided and assisted by the advice of the attorney for the city. But it was a decision of a corporate nature and not one to be decided by any but the corporation; and it was one which we think was beyond the power of an attorney to make, while acting merely in his capacity as an attorney, before suit brought and without specific authority." (loc. cit. 422).

The attorney general of the State of Missouri had no power by his representation of the insurance superintendent, to bind him as to future actions vested in him by law and this lack of authority was expressed by the Supreme Court of Missouri, in the case of *State of Missouri, ex rel. Ben C. Hyde, Superintendent of Insurance, Department of the State of Missouri, Relator,* v. *Westhues, Judge of Circuit Court, Respondent,* 316 Mo. 457, 290 S. W. 443, involving the identical stipulation here, the Court holding that neither the attorney general nor the superintendent of insurance could bind themselves as to the future conduct of the superintendent, stating:

"The conditions prescribed by the statute are alone determinative of his duty and authority in the premises. This proposition is so evident that the citation of authority is deemed unnecessary."

The stipulation could not be held valid if it fixed the status of insurance rates in any way and the Supreme Court of Missouri, in the case last cited, said of this stipulation:

"That agreement, as we have endeavored to show, did not attempt to fix 'the status of insurance rates'," etc.

The statutory court from which this appeal is taken has treated the stipulation as fixing the *status of rates* and fixing them so firmly that they are not even the subject of attack for confiscation or unconstitutionality. If as must be assumed, the statute in question is unconstitutional and invalid and the rate order is confiscatory and void, then the lawful rates of insurance premium are those which the plaintiff has exacted and to the present time retained. To hold that an estoppel arises against the appellant, such conclusion must rest upon the theory that it has profited by what has occurred or the state has been harmed. If the statute and the rate order are nullities then the rates which appellant collected were legal rates and no more than it was entitled to collect. If it has collected no more than it was entitled to collect and retain, it has collected nothing inequitably and no basis for an estoppel can arise.

It is obvious from the foregoing considerations that there is no element in the stipulation which can have any effect to bar the present action. The Statute of Missouri is capable of two constructions,—either that the statute expressly prescribes confiscation; or that the statute permits the superintendent to allow the old rates to be collected pending review proceeding.

In the first view the statute is clearly unconstitutional.

In the second view, the appellants gain nothing by the stipulation, for the superintendent was only exercising a power which already existed in him by express statute. The statute, as it existed when the stipulation was executed, provided:

> "During the pendency of such action or review, each insurance company or other insurer shall not charge any rate or premium in excess of that *fixed by the Superintendent* of Insurance."
>
> Laws of Missouri, 1915, page 313.

This may mean that the insurance companies could only charge the newly reduced rates pending review. If so it expressly commands confiscation, if the newly fixed rate was, in fact, confiscatory. The statute however, does not expressly state that the rate charged shall not exceed that *fixed* by the superintendent *in his rate order*. It is consistent with the language of the statute for the superintendent to reduce rates by a rate order, and fix another higher level, (pre-existing rates) as the rate to be collected pending review. To save the statute from condemnation as a confiscatory act, it was stipulated that in the event he made an order reducing rates, he should *also* make an order permitting old rates to be collected pending review upon the giving of bonds. This was no more than a reasonable construction of the statute and therefor appellant gained nothing by the stipulation, for the superintendent was empowered and should reasonably so act in the absence of any agreement. The stipulation therefore, was of no more force and effect than had the attorney general joined in the stipulation saying "If the Superintendent makes any rate order in the future, he will make it reasonably, so that it will not be so unreasonable on its face that any court would immediately enjoin it."

No estoppel can arise against a person subject to rate regulation by accepting from the superintendent an agreement to which they mutually subscribe, to the effect that the superintendent agrees in the future to act with some degree of reasonableness.

The provisions in the stipulation as to what the superintendent proposed to do upon a possible new hearing was not binding upon him, as he could have a hearing or not, as he saw fit; give notice or refrain from it, as he thought proper; and in fixing rates proceed, in obedience to the statute which he had no power to enlarge or restrict by stipulation.

Upon making of a rate order by the superintendent, if he should make one, the appellant had a right to attack it in any

way it saw fit, and could not be limited by an agreement made by attorneys in a previously dismissed suit before the rate hearing was had and before its rights were infringed.

Appellant has taken no action whatever which it was not entirely free to take under the law, regardless of any stipulation, has acquired no advantage and no premiums which it had not full power to acquire, regardless of the stipulation.

For these reasons, we say, that the plaintiff has had no advantage and the defendant has suffered no damage by any action done or omitted because of the existence of a stipulation. No action has been taken either by the superintendent or by the plaintiff pursuant to or under the stipulation or purporting to conform to it or be controlled by it.

The statutory court below assumed that there was great vitality in the provision respecting the conditions of the bond to be given by insurance companies upon instituting review proceeding in the courts of Missouri. The parties could not by any stipulation in advance of the institution of a suit, bind the court to accept or approve any particular bond. An attempt to make a stipulation binding upon the courts in future proceedings, was before this court in the case of *Swift & Co.* v. *Hocking Valley Ry. Co.*, 243 U. S. 281. The parties there stipulated upon facts "for the purpose of review only from the common pleas court." This stipulation was made after the order of the court had been made upon a demurrer which had the legal effect of confessing the complaint. This Court holds that such a stipulation is a nullity and that "no stipulation of parties or counsel, whether in the case before the Court or in any other case, can enlarge the power or affect the duty of the Court in this regard." Obviously the conditions of any bond to be exacted from plaintiff and other companies was in the control of any court in which a proceeding might thereafter be brought and the Court could exact a bond on such terms as it though proper. The fact that after the institution of review proceedings, the plaintiff

furnished a bond in pursuance of court order upon the terms prescribed by the Court cannot be creative of an estoppel, even if the parties had agreed before any suit was brought what the terms of such a bond would be if there ever were any.

The stipulation was clearly applicable to the procedure in the review proceeding alone and did not purport to affect the rights of the parties as individuals after exhaustion of the aggregate or *en masse* review proceeding. There was no waiver of constitutional rights, express or implied, by the respective insurance companies, and none by appellant, but at most only procedure defined for a specific contemplated court proceeding. To extend it to operate as a general waiver of invasion of individual constitutional right at all times and in all places is to give it a meaning and an intent entirely foreign to the express or implied intention of the parties.

In the case of *Burnham* v. *North Chicago Street Ry. Co.*, 88 Fed. Rep. 627, the Circuit Court of Appeals for the Seventh Circuit had for consideration a stipulation waiving a jury and submitting a case to a Court. The Court held such a stipulation did not operate as a waiver of jury trial as to subsequent trials in general, but only in the specific trial then in contemplation, and said:

> "The right of trial by jury in cases at law, whether in a civil or criminal case, is a high and sacred constitutional right in Anglo-Saxon jurisprudence and is expressly guaranteed by the United States Constitution. A stipulation for the waiver of such right should therefore be *strictly construed in favor of the preservation of the right.*" (Italics are ours).

A like construction of the stipulation in the case at bar, namely, a strict construction in the favor of the preservation of constitutionality, makes the opinion of the lower court untenable.

The intent of the stipulation was that in the review proceeding the statute as written, should not be attacked as un-

constitutional. If it should be applied or construed thereafter by the superintendent or thereafter construed by the Supreme Court, so as to write unconstitutional terms into it or apply it unconstitutionally to individual insurance companies, it was not in contemplation that complaint of such invasion of right should be debarred. The stipulation was not operative to prevent the present plaintiff from attacking a subsequent rate order as confiscatory and attacking the statute as it might be construed thereafter by the Supreme Court of Missouri, and as it might be applied and justified by the Supreme Court. The stipulation that the companies would not in the aggregate review proceeding attack the statute as written, is no bar to the present proceeding attacking the statute as construed and applied in a rate order justified by the Supreme Court of Missouri. The distinction between an attack upon a statute as written and an attack upon such statute as administered and justified by the Snpreme Court of the State, is pointed out in the case of *Myles Salt Co.* v. *Iberia Drainage District,* 239 U. S., loc. cit. 484.

VI.

The stipulation did not fix the status of insurance rates. The powers and duties of the superintendent were affixed by statute. He could not bargain respecting them. The stipulation therefore was lacking in mutuality and had no binding effect.

The stipulation cannot be effective as an "estoppel" as the Court calls it (R. 129) because the stipulation is entirely lacking in any mutuality. The appellant had the right, entirely regardless of the stipulation, to file a review proceeding and to exact pre-existing rates. The Supreme Court of Missouri, in the case of *State ex rel. Hyde, Superintendent of In-*

surance v. *Westhues, Circuit Judge, respondent*, 316 Mo. 457, 290 S. W. 443, considered this identical stipulation and the statutes giving power to the superintendent. The Court in that case held that the stipulation could not enlarge or restrict the action of the superintendent of Insurance in any particular, and says:

> "The Superintendent of Insurance cannot so bind himself. The conditions prescribed by the statute are alone determinative of his duty and authority in the premises."

The statutory court from which appeal is taken is in error in assuming that the stipulation is a mutual agreement which fixed the status of insurance rates. The Supreme Court of Missouri, in construing this agreement says:

> "That agreement, as we have endeavored to show, did not attempt to fix 'the status of insurance rates,' It dealt solely with the conduct of the parties and the procedure to be observed in a specific court proceeding."

VII.

If the stipulation be construed as a waiver in advance of infringement of guarantees of the Fourteenth Amendment, it is void. Appellant was under duress.

The rate reduction order which preceded the one here under litigation, was made on January 5, 1922. It provided for a fifteen per cent reduction in rates. It is fully set forth in the affidavit of Paul W. Terry (R. 83). It was upon the vacating of such rate order and dismissal of the suit brought to enjoin it, that the stipulation in question was executed. The rating statute as it existed in January, 1922, when the stipulation was executed, provided for a review proceeding, but provides:

> "The orders and directions of the Superintendent of Insurance, together with his findings or determinations of fact, upon which such order or determination is

founded, shall be reviewable by a proper action in the courts. * * * During the pendency of such action or review, each insurance company or other insurer shall not charge any rate or premium in excess of that fixed by the Superintendent of Insurance."

Laws of Missouri 1915, page 313; Revised Statutes Missouri 1919, Section 6284.

The statute provided that during the pendency of any "*such action or review,*" the rate "fixed" by the superintendent should be charged, thereby providing for day by day confiscation, if the rate fixed was, in fact, confiscatory. Not only were the insurance compainies thus subjected to possible confiscation by the language of the statute, but there was no provision in the statute for notice or hearing, but Section 6283, Rev. St. Mo. 1919, provided that the superintendent was "empowered to investigate the necessity for a reduction of rates, and if upon such investigation, it appears that the result of the earnings in this state of the stock fire insurance companies for five years next preceding such investigation, shows there has been an aggregate profit therein in excess of what is reasonable, "he shall order such reduction of rates as shall be necessary," etc.

Not only was there no provision in the statutes for notice or hearing, but it appears affirmatively in the record herein that "this rate reduction order (in effect when the stipulation was made) was made by the Superintendent without any notice whatever to any of the fire insurance companies doing business in Missouri, and without any notice to the Missouri Inspection Bureau, and without any hearing or opportunity to be heard according to any of said companies or said Bureau." (R. 84.)

The fact that there was to be any rate order, or that one was under consideration, first came to the attention of the insurance companies "after the order made and promulgated by the Superintendent." (R. 85.)

The insurance companies, of whom appellant was one, filed suit to enjoin such order, which was clearly and uncontradictedly an unconstitutional, void order. *Coe* v. *Armour Fertilizer Works*, 237 U. S. 412. While the same was being litigated, day by day confiscation of the property of appellant and others would occur. It was in this situation that the stipulation was entered into, which is the subject of this discussion. (R. 85.) It seems to us that discussion or citation of cases is scarcely necessary to show that:

(1) Such former rate order would ultimately have been nullified;

(2) Until the same was nullified (probably not until this court was reached), the insurance companies would be subject to day by day confiscation;

(3) The insurance companies in this plight, were under implied duress of arbitrary action, whereby they might have their licenses revoked. Section 6287 of the Rating Act expressly providing for cancellation of license for violation of Section 6283 already mentioned.

A part of Section 6287 as it then existed, reads as follows:

> "The Superintendent of Insurance, if he shall find that any insurance company or any officer, agent or representative thereof, has violated any provision of this article, may in his discretion, revoke the license of such offending company, officer or agent."

The court below erred in its ruling that there was a valid consideration free from elements of implied duress inducing waiver of constitutional rights (in the event of further invasions in the future). There was no other escape from immediate confiscatory acts of a state. The appellant (and other insurance companies) had its choice between the alternatives:

(*a*) Submit to confiscation of its property day by day, as expressly directed by statute; or

(*b*) To refuse to comply with the express provisions of the statute and thereby incur the penalty of cancellation of its license and lose its established business in the state.

Having this choice of evils, one of which was scarcely preferable to the other, the superintendent offered, on prescribed conditions, to release appellant and other insurance companies from this situation which the lawless statute of the state had created. The superintendent stipulated with the appellant and other insurance companies that they (the superintendent and such insurance companies), would construe the statute (providing that pending any review or action attacking the rate order of the superintendent, the "insurer shall not charge any rate or premium in excess of that *fixed by the Superintendent* of Insurance") as empowering him to perpetuate preexisting rates pending review. It was provided that the superintendent would withdraw his unconstitutional and lawless action so made without notice or hearing, and would give notice and have a hearing thereafter. To the point of granting a notice and hearing, the parties stipulated for nothing not provided by the statute. The statute did not require any notice or hearing or provide for one. In this respect also that statute was unconstitutional. Surely appellant gained nothing to the disadvantage of the superintendent when it was accorded notice of a proposed hearing.

In other words, the parties sought to create constitutional safeguards by agreement, for which the statute made no provision. After such notice and hearing, if the superintendent made a rate order reducing rates, (which it was not required by the stipulation he should do), then it was provided that pending the review proceeding, the superintendent and the insurance companies would proceed under their mutual construction of the statute, in that the statute expressly provided that the insurers should not charge any premium in excess of that

fixed by the superintendent, whereas the stipulation provided that the insurance companies might charge the old rate which he *fixed* pending review if he followed the agreement.

The effect of the opinion of the court below in the case at bar, is that the superintendent had power to and did stipulate with private citizens that he would proceed squarely in contravention of the statute, which statute it construes as an unconstitutional enactment expressly providing for confiscation. If the statute means what the Court implies that it does then the administrator of an expressly confiscatory statute has by the terms of such a null statute greater power than he would have under any conceivable valid law. In so stipulating, let it be assumed his motives were the best, namely, to extend to the insurance companies the constitutional right to be exempt from confiscation, guaranteed by the Fourteenth Amendment of the Federal Constitution, but the fact remains that if the court below is right in its construction he was making an agreement beyond his powers, because expressly contrary to the statute under which his powers arose. The effect of the stipulation, stripped of its detail, is that:

1. The superintendent of insurance recognizes that he has committed a violation of the constitutional rights of citizens within the jurisdiction of his state, by making a rate reduction order without notice or hearing;

2. A failure to comply with such order on the part of the insurance companies will, under the statute, subject them to cancellation of their license and thereby destroy their established business in the state;

3. In this situation it is proposed that the superintendent vacate such unconstitutional order, the only alternative to the insurance companies being that they will be compelled to submit to day by day confiscation, or cancellation of their licenses;

4. With this sorry alternative before them, it is proposed to relieve them of the confiscatory rate order and threat of revocation of their licenses upon condition;

5. The condition imposed, is that if the superintendent later make a reduction order pursuant to notice and hearing, (which were not provided by the statute and which therefore proceeded from his grace alone) and after such hearing he makes a reduction order on the basis specified, that then the following supposed mutual obligations of the parties shall arise:

   (*a*) The attorneys for the superintendent, the chief law officers of the state, make an agreement for a state official, that he will fix the rate pending review at old rates until the matter is tested (or if the court below is to be followed, violate the law, by permitting the insurance companies to collect premium in excess of that fixed by the superintendent of insurance). The superintendent had no power to agree to violate a valid statute because he would thereby agree to violate the statute under which his powers arose. The Attorney General had no power as an attorney, to stipulate that the superintendent should violate the law or to bind him to do an act contrary to the statutes which controlled his action;

   (*b*) The attorneys, representing the insurance companies in the aggregate suit to enjoin an aggregate order for reduction of rates, had no power to bind the individual insurance companies, as respects their individual action for the future. They had no power to waive infringements of constitutional right anticipated as possibilities in the future, not involved in the then pending litigation, and respecting rights and liabilities which had not yet accrued. The insurance companies would no more be bound by such an agreement, if they made it themselves, than if made by the lawyers representing them.

The situation was one wherein an implied duress existed consequent upon lawless action of the superintendent, with the constant threat of the statute providing for cancellation

of license. *Atchison, Topeka and Santa Fe Railway Company v. O'Connor*, 223 U. S. 280.

The element of duress is completely destructive of the appellees' claim of estoppel. In *Union Pacific Railway Company v. Public Service Commission of Missouri*, 248 U. S. 67, the Court considered a case where a railroad applied for a certificate authorizing issue of bonds, and the Supreme Court of Missouri held the railroad estopped from complaining of the unconstitutional nature of fee exaction, because it had voluntarily made an application in writing for a certificate authorizing the issue of bonds. The Supreme Court of Missouri in that case, held that the action of the railroad was voluntary and that it was estopped. This Court held that no estoppel arose, and said:

> "On the facts we can have no doubt that the application for a certificate and the acceptance of it were made under duress. The certificate was a commercial necessity for the issue of bonds. The statutes if applicable, purported to invalidate the bonds and threatened grave penalties if the certificate was not obtained. The railroad company and its officials were not bound to take the risk of these threats being verified. Of course it was for the interest of the company to get the certificate. It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that the choice was made according to interest does not exclude duress. It is the characteristic of duress properly so-called."

It was suggested in that case that the state might have disregarded the statutes providing for penalties, or would not enforce the unlawful exaction, but this Court said:

> "The railroad company was not bound to take the risk of the decision, and no proceeding has been pointed out to us by which it adequately could have avoided evils that made it practically impossible not to comply with the terms of the law."

The same situation here exists. Each of the insurance companies doing business in Missouri issued many policies

daily and each issuance of a policy at the formerly existing rates would be a violation of the statute and would involve the revocation of license of the insurance company and of its agent, and in addition would subject the officers, agents and reperesentatives of the companies to the other penalties of the statute. The picture of duress is complete. Among the other penalties provided, for proceeding in violation of the statute, are that:

> "Any fire insurance company, or any director or officer thereof, or any agent or person acting for or employed by such company, who * * * shall wilfully suffer or permit to be done any act, matter or thing in this article prohibited or declared to be unlawful * * * or shall be guilty of any infraction of this article, shall be deemed guilty of a misdemeanor, and shall upon conviction thereof, be punished by a fine not to exceed $500.00 for each offense."

The case of *Swift & Company* v. *United States,* 111 U. S. 22, was a suit involving stamps upon proprietory articles, commission upon which, under proper construction, was payable in cash and not in stamps, as claimed by the Internal Revenue Department. Each purchase was upon a written order. Written receipts were demanded, disclosing full payment of the commission. An account was kept upon which there was a memorandum placed stating the account to be correct, complete and true, which was required to be signed by the claimant. This Court says:

> "The question is whether the receipts, agreements, accounts and settlements made in pursuance of that demand and necessity were voluntary in such sense as to preclude the appellant from subsequently insisting upon its statutory right. We cannot hesitate to answer that question in the negative. The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction, or discontinue its business. It was within the power of the officers of the law and could only do as they required. Money paid or other value parted with under such pressure has never been

regarded as a voluntary act within the meaning of the maxim *volenti non fit injura.*"

Robertson v. *Frank Brothers Company,* 132 U. S. 17.
Gaar Scott & Company v. *Shannon,* 223 U. S. 468.

Even if it might be said that appellant might have had a right to sue and might ultimately have won in its suit, as was said in *Atchison, Topeka and Santa Fe Railway Co.* v. *O'Connor,* 223 U. S. 280, l. c. 286:

> "The penalty would go on accruing during all the time that might be spent before the validity of the defense would be adjudged. As appears from the decision below the plaintiff could have had no certainty of ultimate success. We are of opinion that it was not called upon to take the risk of having its contracts destroyed and its business injured and of finding the tax more or less nearly doubled in the case it finally had to pay. In other words we are of the opinion that payment was made under duress."

VIII.

A stipulation was made by attorneys representing all stock insurance companies en masse. It did not and could not bind the several insurance companies to forego assertion of individual infringement of constitutional right thereafter accruing.

There was no contract estopping the claim of confiscation.

The agreement having been made January 5, 1922, before the hearing and before the rate order of October 9, 1922, it was not the intention of the stipulation that the parties individually waive the right to question constitutional invasion of right if it should occur upon an order thereafter made. It related only to a specific controversy respecting aggregate experience, in which constitutional attack upon the statute was not to be made and which the Courts have since held was a proceeding in which constitutional claims of confiscation could not arise. If we are correct in the position that

the rate order and the statute authorizing it are creative of a constitutional invasion of right as against the appellant and that its property is confiscated, then a stipulation made under duress of a prior rate order, cannot bar appellant's constitutional attack. The effect of the decision of three judges is that the action of appellant in refusing to conform to an admittedly confiscatory rate order, is creative of an estoppel and that appellant and other insurance companies by their stipulation, in advance agreed that they would submit to any subsequent confiscation no matter how destructive. If they had so agreed, the agreement would be a void one and not binding upon them. In *Banton* v. *Belt Line R. R.*, 236 U. S. 414, it was held that the action of a railroad company in *accepting* and *putting in effect* a rate order "did not surrender the protection of the Fourteenth Amendment if the order was found to be, or if thereafter it should become, confiscatory." There is even less ground for assertion of an estoppel in this case, wherein the appellant refused to reduce its rates to a confiscatory level.

The State of Missouri may not hold that plaintiff waived its right to resort to a federal tribunal for invasion of rights granted by the Federal Constitution, by pre-existing stipulation or agreement. This is definitely decided in the case of *Insurance Company* v. *Morse*, 20 Wallace 445, where it is said that:

> "Every citizen is entitled to resort to all the courts of the country and to invoke the protection which all the laws or all these courts may afford him. A man may not barter away his life or his freedom or his substantial rights."

If his constitutional rights have been invaded he may forego them, but it was said in the same case:

> "He cannot however, bind himself in advance by an agreement which may be specifically enforced thus to forfeit his rights at all times and on all occasions whenever the case may be presented."

See also *Barron* v. *Burnside*, 121 U. S. 186.

The right to complain of confiscation and denial of equal protection are guarantees no less important than the right to resort to a Federal Court in a proper case. The right is an absolute right and this Court says of the right to resort to a Federal Court that:

> "Any agreement, *stipulation* or state law precluding them from this right is absolutely void,—just as void as would be an agreement not to resort to the said courts for redress of wrongs or defense of unjust actions, or as would be a city ordinance prohibiting an appeal to the State courts from municipal prosecutions."
>
> *Doyle* v. *Continental Insurance Co.*, 94 U. S. 535.

(Dissenting opinion subsequently adopted as the view of this Court in *Terral* v. *Burke Construction Co.*, 257 U. S. 529, 533.) If a stipulation is void which prevents resort to a Federal Court in future situation which may warrant it, then a stipulation to the effect:

> "If Missouri takes my property without due process of law by proceedings not now *in esse*, I agree that I will not bring suit to enjoin such action but abide by it even if it destroy me."

is also void. The exaction by the state from those within its borders of an agreement not to assert constitutional grounds if the state thereafter trespass on rights, is void "whether waived in advance or not."

Terral v. *Burke Construction Co.*, 257 U. S. 529.

The hearing before the superintendent and his rate order were hearings upon aggregate experience and related to an order applicable to companies in the aggregate. It did not relate to the experience of any particular company, nor did it rest upon the experience of an individual company, nor was the question of confiscation as respects an individual company legally involved. The stipulation in question dealt entirely with the determination of aggregate experience to be ascertained upon the earned and incurred basis and provided that the superintendent should make an order "based upon such findings of fact" which, if made, should be respecting "the rates charged by such stock companies on all fire

lightning, hail and windstorm insurance business written by them in the State of Missouri." It did not relate in any way to determining the rates of the plaintiff as a separate entity, nor did it provide that the plaintiff should not secure an injunction, but that no injunction should be applied for "in said matter," in which the companies proceeded *en masse*. There is nothing in the stipulation binding the plaintiff as a separate entity in any way and it is left entirely free in a proceeding instituted solely by itself, to proceed for an injunction or to take any action it might see fit. The stipulation does not purport to be made for this appellant as a separate entity, but only on behalf of the companies *en masse*, as related to a proposed hearing *en masse* pursuant to which an order was to be made regulating rates in the aggregate, to be reviewed by a proceeding by companies in the aggregate.

If the rate order here in question is confiscatory,—which the record discloses that it is,—appellant cannot be precluded from challenging its confiscatory nature because of contract or agreement to submit to confiscation.

The commonest case in which this issue has arisen is in those cases where a five-cent fare franchise equivalent to a contract has been accepted by a street car company. Every Court before which such matters have come for determination, has held that if it was confiscatory in fact a greater rate should be allowed enabling the utility to function. The effort to base an estoppel in such cases has invariably failed. As this Court said in *Southern Pacific Company* v. *Interstate Commerce Commission*, 219 U. S. 433:

> "The rate making body cannot substitute for a just and reasonable rate, a lower rate, either on the ground of policy or on the ground that the railroad was, by its former conduct, estopped from charging a reasonable rate."

McFarland v. *American Sugar Company*, 241 U. S. 79, 85.

Union Dry Goods Company v. *Georgia Public Service Corporation*, 248 U. S. 372, 9 A. L. R. 1420.

IX.

The Missouri Rating Statute violates the equal protection clause of the Fourteenth Amendment, in that it regulates rates of stock fire insurance companies and does not apply to other insurance doing an identical business.

The rating statute of Missouri hereunder attack, is made applicable only to stock fire insurance companies, whereas other stock insurance companies can be and are organized under other sections of the Missouri statutes and the burdens of the regulation are not made applicable to such other stock insurance companies writing identical business, nor is the regulation application to mutual or reciprocal companies, or individual insurers, although large amounts of competing insurance are written by all such insurers (Bill of Complaint, Par. 12-i, R. 16, 17). The statute is violative of the equal protection clause of the Constitution in this respect.

Hanover Fire Insurance Co. v. *Harding*, 272 U. S. 494.

Quaker City Cab Co. v. *Pennsylvania*, 277 U. S. 389.

X.

The rate fixing here under review is an unconstitutional invasion of right. If it may be justified by the ruling in German Alliance Insurance Company v. Lewis, 233 U. S. 389, then the decision in that case should be modified.

A substantial question exists in this case in the claim made in the bill of complaint, that the power to fix rates upon aggregate experience basis, without any inquiry as to the individual situation of the plaintiff, and upon a basis different from that employed in other states, is subversive of the whole plan of insurance and destructive of the balance in the business necessary to its conduct.

This leads to the allegation in the bill that the business of insurance is not affected with the public interest, in the sense that the state may prescribe rates to be charged, at least upon the basis and upon the considerations contemplated in the Missouri statute, and that the state has exceeded is justifiable police power in the enactment of this statute, as it has been applied in the instant case to appellant.

We recognize that the subject of limits of police power is a most difficult subject, and it is asserted and claimed in the bill and now asserted, that the case of *German Alliance Insurance Company* v. *Lewis*, 233 U. S., page 389, should be disapproved, or at least held not to warrant interference with the appellant's business, as is contemplated in this case.

We shall not argue this matter *in extenso* in this brief but recall to the Court what this Court said in *Tyson and Brothers Union Theatre Ticket Offices, Inc.* v. *Joab H. Banton, as District Attorney*, 271 United States 418, 47 Supreme Court Reporter 426, 71 Law Edition 493 (October term, 1926). The Court there reviews the *German Alliance case* and the views expressed in it. The opinion in *Tyson case* discussing the *German Alliance case* says:

"(1) That case 'marks the extreme limit to which this court has thus far gone in sustaining price fixing legislation.'

(2) The difference between insurance and other business, which justify attachment of the police power of the state to insurance rating are:

'That in an insurance business, each risk was not individual; that "there can be standards and classifications of risks determined by the law of averages," and, while there might be variations, that rates are fixed and accompanied to such standards.'

(3) The effect of insurance—indeed, it has been said to be its fundamental object—is to distribute the loss over as wide an area as possible. In other words, the loss is spread over the country, the disaster to an individual is shared by many, the disaster to a community shared by

other communities; great catastrophes are thereby lessened and it may be repaired."

(4) "The contracts of insurance may be said to be interdependent. They cannot be regarded singly or isolatedly and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositories of the money of the assured, possessing great power thereby and charged with great responsibility."

(5) The decision proceeds upon the ground that the insurance business is to be distinguished from the ordinary private business; "that an insurance company is, in fact an instrumentality which gathers funds upon the basis of equality of risk from a great number of persons—sufficiently large in number to cause the element of chance to step out and the law of averages to step in as the controlling factor, and holds the numerous amounts so collected as a general fund to be paid out to those who shall suffer losses."

(6) "Insurance companies do not sell commodities; they do not sell anything. They are engaged in making contracts * * * the effect of their activities being to constitute a guarantee against individual loss and to put a large number of individual contributions into a common fund for the purpose of fulfilling the guarantee."

(7) "It was from the foregoing and other considerations peculiar to the insurance business that the court drew its conclusions that the business was clothed with a public interest."

The corollaries of these propositions are:

(1) The limits of price fixing legislation may not be extended except upon the grave conclusion that the public good will be so injuriously affected by not extending the police power, that action by the state may be justified because the public good offsets private disadvantage.

(2) Premium charges are greater for a five-year term than for a one-year term. A rate regulation order which ignores such time element in measuring income (by not giving credit for unearned premiums in stating income for a period of time) is destructive of the standards and classifications of risks applied when the premium is exacted, and, therefore

destructive of the law of averages upon which the business rests.

(3) A common standard throughout the country is necessitated by the law of averages, upon which insurance fundamentally rests. If differing standards may be employed at will in the various states (Missouri setting up an arbitrary standard not existing elsewhere), the distribution of loss is limited as to area; losses are localized and not spread over the country; disasters are limited to relatively small communities, and great catastrophes are not lessened.

(4) The controlling function of the police power in regulating insurance must be directed to insuring solvency; for a company that collects premiums and cannot pay its losses has failed in the primary essential of the business. The adoption of a method of profit measurement which obscures the credit standing of the companies and tends to destroy credit and lessen the integrity of the insurance fund cannot be supported on any reasonable theory of the application of police power.

(5) The abandonment of the theory of reserving funds to meet losses of the future which have been contracted against, relegates insurance to the status of private business. It treats contracts as independent and fails to take into account the essential peculiarity of interdependence. To refuse to provide reserve for the protection of interdependent contracts to be fulfilled in the future, is a denial of the essence of sound insurance. The distinguishing characteristic of insurance is abandoned if appropriate reserves for the future are to be eliminated from calculation designed to show profit. A method of calculation which makes no provision for obligations incurred and which must be met in the future and treats them as non-existent, relegates the entire matter to chance and destroys the application of the law of averages.

(6) The fundamental purpose of insurance contracts being a guarantee against individual loss, if outstanding contracts upon which losses may occur in the future are not provided for before striking a profit balance, then the means of fulfilling the guarantee provided in the contract is destroyed.

(7) If the considerations which impelled this Court to hold that the business of insurance was clothed with a public interest are to be abandoned; then the reasons failing, the conclusion also fails, and insurance cannot be held to be clothed with a public interest.

In the minority opinion of Mr. Justice Bradley, in *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535, (which minority opinion is now the law governing this court. Mr. Justice Bradley says:

> "The conditions of society and the modes of doing business in this country are such that a large part of its transactions is conducted through the agency of corporations. This is especially true with regard to the business of banking, insurance and transportation. Individuals cannot safely engage in enterprises of this sort, requiring large capital. They can only be successfully carried out by corporations, in which individuals may safely join their small contributions without endangering their entire fortunes. To shut these institutions out of neighboring states would not only cripple their energies, but would deprive the people of those States of the benefits of their enterprise. The business of insurance, particularly, can only be carried on with entire safety by scattering the risks over large areas of territory, so as to secure the benefit of the most extended average. The needs of the country require that corporations, at least those of a commercial or financial character, should be able to transact business in different states."

It cannot be said that because the police power of Missouri is co-existent with the boundaries of the state, that what occurs in other states is a matter of no materiality. In fact, the broad averages employed in the business require a con-

sideration primarily of the experience in the State of Missouri. This does not, however, permit standards in Missouri endangering interdependent contracts in other states. The statutes specifically recognizes this in its provision that consideration shall be given to the conflagration hazard within and without the State of Missouri. Such provision, if faithfully carried out, cares for one of the essential extra-territorial considerations.

Another consideration which cannot be ignored is the fact that a tornado sweeping over three or four states may produce losses so great in those states that it would not be practicable for the companies ever to make charges to meet their losses out of the premiums of such states. The occurrence of conflagrations in the same year in two or three large cities of the country might produce losses so staggering, that the states in which they occurred might not show a profitable experience over a period of 50 or 100 years of time. To penalize the business of that state by charges designed at all events to meet such loss would put them at a great disadvantage with other states. It is neither desirable nor practicable to do so. The consequence is that the profit limits measured by the experience in any given state must be most liberal before the restraining power of the state may be exercised. The common statement of the limits of exercise of police power is that it must be "reasonable"; it must "not be arbitrary," etc. These general terms are so flexible that they do not always serve to direct the mind to a single conclusion. We respectfully submit the following observations, designed to aid the Court in defining the matter.

The police power, in general, extends to the (1) public health; (2) morals; (3) safety; (4) regulation of business devoted to the public use or clothed with a public interest. In the case of the public health and safety, more or less summary action may be permitted—as, in destroying a build-

ing in the course of an oncoming fire, to save other property; or the quarantine of those afflicted with contagious or infectious diseases.

In the case of police regulations affecting morals, a less summary procedure may, in general, be permitted; so that a person suspected of operating a bawdy house, may not have his rights summarily destroyed, but is entitled to some kind of a judicial inquiry before action may be taken.

In the case of business affected with a public interest, which is inherently lawful and so recognized to be, the regulations must trench on private rights as little as is consistent with conservation of the public interest. So it has been held that the grant of authority to an insurance commissioner, to grant or refuse licenses to agents and to cancel licenses according to his unqualified judgment, is beyond the exercise of proper police power.

Welsh v. *Maryland Ins. Co.*, 47 Okla. 933, 147 Pac. (Okla.) 1046; L. R. A. 1915 E. p. 108.

So a statute prohibiting an insurance company from having more than one agent in given territory has been held to be beyond the proper sphere of the police power.

Northwestern Nat. Ins. Co. v. *Fishback*, 130 Wash. 490, 227 Pac. Rep. 516 (Wash.).

A statute, limiting the price of food stuff to "reasonable" prices, without any definition of reasonableness, is a void enactment.

United States v. *Cohan Grocery Co.*, 255 U. S. 81. 41 S. C. Rep. 298, 65 Law. ed. 516.

Nor may Courts read into a statute what is not there under the guise of construction.

Importers & Exporters Ins. Co. v. *Rhodes*, 239 New York 420; 146 N. E. 648.

The business of insurance is a highly complex business, the making of equitable rates in which is involved in scientific estimations of probability, many, if not most, of which are determined in laboratories, where, by test and experiment, the fire resistive qualities of objects are ascertained with great nicety, and rates predicated upon elements involving structure, exposure, protection and combustibility of contents. The affixing of rates upon inflammable oils and pig iron, to determine the relatively proper charges, presents problems of the greatest nicety. These considerations involve, also the distribution of equitable charges between different communities, so that the charges may be equitably distributed as between the different communities in a state. A proper perspective contemplates also an equitable distribution between states involving considerations of the different structures in the various states, the differing insurable properties there existing and their qualities, as in case of cotton in one state and grain in another; the difference in climatic conditions, taking into account the aridity of one and the heavy rainfall or snowfall in another. The balance of all these elements one against the other is what permits equitable charges so that a merchant in one state may have assurance that the burden of the insurance tax his industry bears shall not be disproportionate to the insurance tax of his competitor—perhaps in a remote state. It seems to counsel that questions of the importance of those here presented should not be determined against appellant on an interlocutory hearing. There is not even an answer on file and may never be any if the Court adheres to the views expressed. It is conceded that irreparable damage will result if injunction do not issue. The balance of injury is such that these important questions might well be reserved to final hearing under proper safeguards.

XI.

The questions here involved are of such importance they should not be determined adversely to appellant on interlocutory hearing.

The stipulation which furnishes the ground for the Court's denial of an interlocutory injunction is not set forth in the bill of complaint, nor in any pleading by the defendant. It appears only in affidavits which were submitted on the motion for interlocutory injunction. Aside from its lack of binding effect, which might be determined from the face of it, the following questions are still open and should not have been determined against appellant at this stage:

(*a*) The insurance companies in proceeding with a review proceeding and giving bonds on the review proceeding either did so as compliance with the stipulation or did so in pursuance of their rights under the statutes and laws of Missouri, independent of such stipulation. These are matters which ought not to be decided against the contentions of the plaintiff on an interlocutory hearing. The balance of injury is such that irreparable harm will result to the plaintiff upon the denial of the injunction (which the court in its opinion concedes) and no harm would be done to the [redacted] or to policyholders of the State, so long as they were properly secured, by deferring determination of the question until final hearing. A much greater assurance of a sound conclusion would exist by so deferring decision.

(*b*) If the stipulation were set forth in an answer (it not appearing in the Bill of Complaint in any way) then the plaintiff should have the right to controvert its effect, if prima facie a bar by showing, if appellant could, that it had been waived by the Superintendent, or that he had in his hearings and in his rate order failed to conform to it, and thereby produced an abandonment of its terms by both parties. If the matter proceeded to final hearing, aside from legal contentions as to its construction and effect,

> plaintiff would insist and assert that the Superintendent departed from the stipulation and did not make findings respecting earned premiums, incurred losses and incurred expenses, nor base his findings upon such grounds as provided by the stipulation.

This would properly be a matter of proof on the final hearing. The proof, on the interlocutory injunction application, was that the superintendent did not make the findings provided by the stipulation, and did not base his conclusions on such findings (Affidavit of P. W. Terry, R. 88), and the verified bill also alleges that the rate order was made by the superintendent and justified by the courts of Missouri by adoption of a basis of premiums *received* as income and losses and expenses *paid* as outgo, (R. 5), which was a departure from the stipulation and squarely contrary to its provisions. The court below, in its opinion, states that the affidavit of P. W. Terry is to the effect that the superintendent did not make the findings provided in the stipulation. (R. 105). The Court confessedly resorts to an *opinion* of the Supreme Court of Missouri to meet this undisputed proof, (R. 105), not resorting to such opinion as to the law or its construction, for which prupose the Court might properly have referred to it, but for supposed facts. The uncontradicted state of evidence on the interlocutory injunction hearing was that the superintendent did not comply with the stipulation and therefore it was not binding. The court below, in order to find ground to defeat the plaintiff on its application, resorted to the opinion of the Supreme Court of Missouri, as indicating that the superintendent did make such findings. (R. 105). In so doing the Court came to conclusions of fact contrary to the undisputed record, and came to a false conclusion. The Court finds however, that it will not leave this matter for determination upon the final hearing, because the Court says:

> "This action is unnecessary because the undisputed evidence is that such deficiency, if it existed, was waived by the companies." (R. 105).

The Court says that after knowledge that the superintendent had not complied with the stipulation, the plaintiff had a right "to repudiate the stipulation and freely take such action as they desired." (R. 105). This we assert, is just what the plaintiff did.

The ground of the decision below, is that even if the superintendent did not make the findings or ground his order upon the basis provided in the stipulation and declined to abide by it, nevertheless the plaintiff and other companies in the same position are estopped, because:

(*a*) They initiated the statutory review proceedings;

(*b*) In the review proceeding, they omitted any attack upon the validity of the statute, or the legality of the proceeding before the Superintendent;

(*c*) They gave bond of indemnity in the review proceeding;

(*d*) They collected the premiums at the old rate. (R. 105).

For these reasons the Court says the compliance by the superintendent has been waived. Taking these grounds in the order stated, we assert that no one of these proceedings was pursuant to the stipulation:

(*a*) The statutory review proceeding was a proceeding of right expressly provided for by the Missouri Statute (Sec. 6284, Mo. Revised Statutes 1919). It was therefore not pursuant to or dependent on any stipulation;

(*b*) There is no evidence in the record that the plaintiff omitted any attack upon the validity of the statute or the legality of the proceeding before the Superintendent. Neither the transcript nor pleadings in the State court appear in the record. If the course adopted by the court below, of resorting to the opinions of the courts for facts be followed, then we may state that examination of the opinion of the Supreme Court of the United States in the case of *Aetna Insurance Co.* v. *Hyde,* 275 U. S. 440, discloses that the unconstitutionality and invalidity of

the statute and the rate order were presented, but the court held that they could not be properly raised in an aggregate proceeding provided by the statute, but only in a case brought by individual companies, alleging infringement of their individual constitutional rights. The record in this case does not contradict this statement;

(*c*) The record discloses that bond was given "upon the order and requirment of the court" in the review proceeding, and that a supplemental bond was given by the plaintiff and other companies, parties to such aggregate proceeding, which was "executed pursuant to the requirement of the court." Such bonds were in the amount of $500,000, each with surety. (See paragraph 6, Bill of complaint, R. 7). There is not a scintilla of evidence that any bonds which were given were "*pursuant to the stipulation*" or otherwise than by requirement of the court.

(*d*) The fourth ground asserted by the court below as showing a waiver is that plaintiff "collected the premiums stipulated." Such action likewise was not pursuant to any right created by the stipulation or recognition of the stipulation as binding. We have elsewhere pointed out that such action does not give rise to an estoppel in any event. The premiums collected were collected because the power existed in the plaintiff to collect such premiums regardless of any stipulation, as the Supreme Court of Missouri has expressly held in the case of *State ex rel Hyde* v. *Westhues,* 290 S. W. 443, 316 Mo. 457. The court in that case says concerning the same stipulation: "That agreement, as we have endeavored to show, did not attempt to fix 'the status of insurance rates'."

The court below treats the order of the superintendent as an act of making of insurance rates, whereas the Supreme Court of Missouri holds to the contrary and says:

"*The making of insurance rates is left with the insurance companies* or the actuarial bureaus of which they are members. The Superintendent of Insurance is given no authority to prescribe or regulate rates. The only power which the statute purports to confer upon him is

to veto the raising of rates or to order a reduction of rates, if upon investigation * * *" etc. "with respect to such a reduction order the statute contains no specific provisions for its enforcement. The insurance companies are not commanded to make their public rating records conform to it. They are not, in terms at least, prohibited from thereafter charging rates in excess of those fixed by the order. Nor is there any express provision making it unlawful to charge and collect the rates as they stood prior to the making of the order." *State ex rel Hyde* v. *Westhues,* 316 Mo. 457.

Under the facts in the record and the statutes as construed by the courts of Missouri, there was no act performed by the appellant, or omitted by it, which could at this stage of the litigation be said to be "pursuant to" the stipulation. If these matters are in any wise in doubt (and we think they are clear in favor of the appellant), such doubts should be resolved against irreparable injury to the plaintiff. No court should upon an inadequate and superficial investigation of the facts, such as lies within the scope of proof on an *ad interim* motion, take action clearly productive of confiscation, when no harm can come to the other party to the suit if the *status quo* be maintained (exacting property security).

XII.

The condition imposed for consideration of the application for injunction,—namely return of 10% of all premiums collected from November 15th, 1922, to date,—is arbitrary and an abuse of discretion.

The Court denied the interlocutory injunction, and in denying it made the order "without prejudice to any plaintiff to renew such application upon showing that it has repaid the excess of ten percentum collected on premiums * * * *since November 15th,* 1922, and up to the date of the renewal

of such application." (R. 59). This language of the order, coupled with the Court's opinion, therefore leaves the option with the plaintiff to renew its application on condition. This condition, which is also the essential ingredient in the denial of the present application for an interlocutory injunction, is a requirement for refunding *from November* 15, 1922, to date. But the rate order was not to be applied until February 1, 1928. The Court has imposed an unlawful and unreasonable burden on the plaintiff which it sets up as a bar to securing the interlocutory injunction to which appellant is entitled. It is provided in the statute that the superintendent, in making an order of reduction of rates, "shall *designate the class or classes* to which the reduction shall be applied if the companies do not within thirty days from the order of reduction submit a class or classes which meet his approval." (Rev. St. Mo. 1919; Sec. 6283).

Following this direction of the statute, and not any stipulation, the superintendent *in his rate order* provided that:

> "If the companies do not within 30 days from this order of reduction submit a class or classes which meets the approval of the Superintendent of Insurance, *the Superintendent will designate* the class or classes to which the reduction shall apply." (R. 5).

It should be noted that the superintendent in making his order followed the statute and not the stipulation. The plaintiff and other insurance companies made no designation of classes to which the reduction should apply, whereupon the superintendent of insurance, *on February* 1, 1928, and not before, designated the classes to which such order should apply. (R. 8, par. 8). The court below, in its opinion, held that under the statute such designation of classes was essential to make the rate order a complete and obligatory order. (R. 129). It therefore held that companies not party to the stipulation, did not have their rates reduced until February 1, 1928. As to the plaintiff, however, and other

insurance companies parties to the stipulation, the Court holds that the rates made by them stand reduced as of November 15, 1922. (R. 59). The reasons which impelled the Court to take so unusual a position were stated by the Court after their attention was called to the matter by counsel upon the rendition of the principal opinion. The Court thereafter filed an addendum to the opinion. (R. 128). The Court in this memorandum says that the rate order may by direction of the statute, be made effective:

(*a*) By designation by companies within thirty days after the rate order was in force; or,

(*b*) Upon their failure to act, by designation of the Superintendent thereafter to be made.

The opinion says:

> "It is thus clear that an order of reduction is not fully in force until such designation is made in one of the above ways. Here no such designation has ever been suggested by the companies and the Superintendent did not make such until February 1st, 1928, when he made the rate applicable to all classes." (R. 129).

In stating why such was the law as to companies not parties to the stipulation, but not in the case of the appellant, the Court says:

> "The stipulation amounted to a designation in advance so far as the parties thereto were concerned." (R. 129).

The Court further says that the companies made a designation of classes further by instituting a review proceeding, as,

> "no review could be had under Section 6287 (sic) until the order was binding. The parties pursued the remedy given by that section."

Therefore the court below says:

> "Such plaintiffs cannot now take a directly opposite position. They are estopped to deny that the order was not in effect as to them from the effective date (Novem-

ber 15th, 1922) provided in the order itself. The plaintiff herein which were not parties to the stipulation are in a better position. They can require an absolute compliance with the statute. As to them the order did not become effective until February 1st, 1928." (R. 129-130).

The result of the position of the court below, therefore, is that a policyholder taking policies in various companies in the year 1927, upon the same property, would have differing rates, being entitled to a refund from companies parties to the stipulation, but not entitled to a refund from other insurers insuring identical property under identical charges specified in the standard policies. The Missouri statute contemplates uniformity of rates of all companies in the state. Therefore, this view if adopted, means that contrary to the intent of the statute, the superintendent and certain insurance companies could create rates on identical property for identical service differing in the case of some companies from rates, exacted by other companies. In this the Court was clearly in error, because:

(*a*) The Superintendent did not follow the stipulation in making a rate order, the stipulation providing that the future rate order *when made* should provide that it apply to all classes. On the contrary the Superintendent followed the statute, stating that all companies, in the State, should have the privilege within thirty days of designating a class or classes, upon failure of which *he would in the future make such designation.* Neither during such thirty days, nor thereafter, did he seek to make a designation as of the date of his rate order.

Quite to the contrary, he made no designation of any kind until February 1, 1928, when he made the designation as of that date of all classes. He did not follow the stipulation in his rate order nor his designation of classes but followed the statute. The Court therefore, holds that the Superintendent might pursue the statute regardless of the stipulation, but the insurance companies, parties to the stipulation, were

bound by it. The superintendent did not in his order, differentiate between different companies in the State, but made an order applicable to all companies doing business in the State. What we have said before clearly indicates that an agreement made before the making of a rate order as to what the superintendent should do and to what classes he should make a rate order applicable, was a nullity and binding on no one and was so treated by the superintendent. If there was any rate order in force in Missouri at all, it is a rate order which was carried to completion on February 1, 1928, up to which time no company was bound to file any schedule of reduced rates because the superintendent had made no direction or designation for doing so.

The designation of classes to which a rate order should apply is not an empty formality. Until there was a designation of classes no one could possibly tell what the scope of the rate order was, or whether on a specified policy there was or was not a reduction in rates.

The Court should not be misled by the language of the rate order providing for a reduction of ten per cent upon the rates charged upon fire, lightning, hail and windstorm insurance. This provision was merely one whereby the amount of the reduction to be fixed in the aggregate was was determined and stated. It still remained to apply it by applying a specified change in the base rate upon apartment buildings, still another upon mercantile buildings and still another on public buildings, etc., etc. There might be a reduction upon cotton gins which might be equivalent to fifteen per cent upon that class; no reduction whatever upon farm risks; a reduction of seventeen per cent upon grain elevators, etc., by such process accomplishing the pre-determined reduction in the aggregate.

The detail of this matter as set forth in the affidavits (R. 90) indicates that no insurance company could know after date of the rate order and prior to February 1, 1928,

what the rate of premium would be upon any specified insurable property, and therefore, they continued charging the old rates because new rates were not effective and could not be applied until the application of the superintendent was directed February 1, 1928. (R. 90.)

The terms imposed by the Court for permitting an interlocutory injunction application being prohibitive and being clearly inconsistent with the directions of the Missouri statute and the rate order made by the superintendent, and imposing a much greater burden, the directions of this Court should go to the court below, that no requirement for refund or security should be made covering any date earlier than February 1, 1928.

The Court is completely in error in holding that "no review could be had under Section 6283 (6284) until the order was binding." The statute is not limited to completed rate orders having elements of finality, but the statute is that "the *orders* and *directions* of the superintendent of insurance, together with his *findings* or *determinations* of facts upon which such order or determinations are founded, shall be reviewable by proper action in the courts." (Sec. 6284 Revised Statutes of Mo., 1919). The mere finding that rates were unreasonably high, is the subject of review. The determination of the facts as to income and outgo were subject to review whether the matter had reached the point of a completed rate order having finality or not. There being a right to review his findings and determination of fact, as well as his orders and directions, there was every right to review the matter whether it had reached the point of requiring reduction of rates or not.

If this view of the matter were in error, and it was a premature review before the order had reached the point of completion, this could only be creative of a dismissal of the review proceedings because prematurely taken, but could not possibly be creative of an estoppel. In other words, if the Court now finds that the order was not an effective

order requiring reduction of rates when it was made and did not become so until February 1, 1928, the order of the superintendent could not acquire characteristics of finality by the later action of aggrieved parties in appealing from it prematurely. The order of the superintendent could neither be enlarged nor diminished by any action taken by the insurance companies *after it was made*. It was in itself, either final or interlocutory as made. It retains those same characteristics regardless of the action of the parties affected by the order. Its nature as to finality must be determined from the order itself and not from the subsequent action of those affected by it.

If the case at bar should proceed to final hearing, it would appear that the parties reviewing the rate order were not in identity with the parties signing the stipulation. In the *interim* some companies ceased doing business in the state and others entered into business in the state. The stipulation was signed by the companies in the state at that time; the review proceeding was brought by the parties who were in the state a year later when that proceeding was instituted. The Court's assumption upon motion for interlocutory injunction of a complete identity of parties in the stipulation and in the review proceedings is false in fact, has no promise in any evidence before the Court, and is no more than a mere assumption upon the part of the Court and contrary to fact.

We respectfully submit that the order appealed from should be reversed and issuance of interlocutory injunction as prayed in the bill should be directed.

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